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A TREATISE

ON THE

# LAW OF FORCIBLE ENTRY AND DETAINER

AND RELATED TOPICS

BY

WILLIAM B. CUNNINGHAM,

OF THE CHICAGO BAR.

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SECOND EDITION.

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## PREFACE TO THE SECOND EDITION.

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Finding so many new cases and new rulings of the courts on the subject of Forcible Entry and Detainer, it seems but just to those who received the former edition of this work so kindly, and only just to myself, that all new cases should be collated and the work brought fully up to the present time.

While the original intention was to prepare a treatise on the law of this State, yet, to state the general principles of the law, which obtain in all of the states; it was necessary to make citations, found in point, from the courts throughout the United States. This also required that the work should be much enlarged, consuming much time in its preparation, and I hope and believe that it will prove to be accurate, a time saver and useful.

WILLIAM B. CUNNINGHAM.

Chicago, 1895.



# TABLE OF CONTENTS.

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## CHAPTER I.

### THE LAW OF THE LEASE.

- SECTION
1. Definition.
  2. Written leases.
  3. Signature and seal.
  4. Implied leases.
  5. Parol leases.
  6. Parol agreement with the lease.
  7. Fraud in leases.
  8. What may be leased.
  9. Consideration.
  10. Agreement for a lease.
  11. Present demise.
  12. Time.

### KINDS OF TENANCY.

13. Tenancy at will.
14. Tenancy at sufferance.
15. Tenancy by the month.
16. Tenancy by the year.
17. Tenancy for life.
18. Covenants.
19. Express covenants.
20. Implied covenants.
21. Surrender of leases.
22. Rooms and lodgings.
23. Who are lodgers.
24. Who are tenants.
25. Lien on baggage for board.
26. Rights of lodgers.
27. Landlord defined.

## FORFEITURE OF LEASES.

- SECTION 28. Nature of forfeitures.  
29. Forfeitures at common law.  
30. Under the statutes.  
31. Waiver of forfeiture.

## ATTORNMENT.

32. Definition.  
33. Implied attornment.

## CHAPTER II.

## ASSIGNMENT OF THE LEASE.

- SECTION 34. Leases may be assigned.  
35. Accruing rent.  
36. When assignment releases from rent.  
37. Lease assigned contrary to its terms.  
38. Voidable—Not void if terms disregarded.  
39. Sub-tenants and their rights.  
40. Termination of sub-lease.  
41. Leases by corporations.  
42. Appurtenances.  
43. Partnership leases.

## CHAPTER III.

## FORCIBLE ENTRY AND DETAINER.

- SECTION 44. The Illinois statute.  
45. The purpose of the action and when it will lie.  
46. Forcible entry forbidden.  
47. Definition.  
48. Nature of the action.  
49. The remedy.  
50. Two wrongs in one name.



## CHAPTER IV.

## WHEN THE ACTION WILL LIE.

## SECOND.—

## SECTION 51. Statutory provisions.

- 52. What force necessary.
- 53. When the owner may enter peaceably.
- 54. Peaceable entry defined.
- 55. Who liable in this action.
- 56. What constitutes forcible entry.
- 57. Detention after demand unlawful.
- 58. Actual force not necessary.

## THIRD.—FOR ENTRY UPON VACANT LANDS.

- 59. The action will lie for entry upon vacant lands.
- 60. Owner deemed to have possession.

## FOURTH.—AGAINST A TENANT HOLDING OVER.

- 61. The fourth cause of action.
- 62. Possession by fraud.
- 63. Sub-tenants.
- 64. Holding over after term expires.
- 65. Possession under lessee.
- 66. What complaint must show.
- 67. Conclusive possession.

FIFTH.—AGAINST A PURCHASER WHO FAILS TO COM-  
PLY WITH THE CONTRACT OF PURCHASE.

- 68. The fifth statutory cause of action.
- 69. Who may sue under this clause.
- 70. What necessary to give jurisdiction.
- 71. Growing crops.

SIXTH.—WHERE THE PREMISES HAVE BEEN SOLD  
AT JUDICIAL SALE.

- 72. The sixth cause of action.
- 73. When right first given.
- 74. Detention of premises after sale.
- 75. Against whom suit brought.

- SECTION 76. Demand necessary.  
77. The proof necessary.  
78. Judicial sales.  
79. What steps necessary to recover under this clause.

## CHAPTER V.

### WHO MAY MAINTAIN THE ACTION.

- SECTION 80. The only issue to be tried.  
81. What possession necessary.  
82. Possession of timber lands.  
83. Who the proper plaintiff.  
84. Cases in illustration.  
85. Growth of the action under the statutes.  
86. Particular cases stated.  
87. Right of exclusive possession requisite.

## CHAPTER VI.

### AGAINST WHOM THE ACTION WILL LIE.

- SECTION 88. The general rule.  
89. What persons included as defendants.  
90. When action will not lie.  
91. Joint occupants—Joint tenants.

## CHAPTER VII.

### POSSESSION.

- SECTION 92. The kind of possession necessary for plaintiff  
93. *Pedis possessio*—unnecessary.  
94. Constructive possession.  
95. Extent of possession.  
96. Judgment for part only.  
97. The demand of possession.  
98. Demand in writing.  
99. The service of demand.

## CHAPTER VIII.

TERMINATION OF THE TENANCY AND HEREIN OF NOTICE  
TO QUIT AND DEMAND.

- SECTION 100. Possession of tenants.  
101. Notice—How signed.  
102. Notice—How served.  
103. Agency—How proven.  
104. Parol leasing for more than one year.  
105. Delivery of key and the acceptance of premises  
106. Statutes of 1865 construed.  
107. How demand should be made.  
108. Yearly tenancy—Notice.  
109. When demand made.  
110. When lease expires.

## CHAPTER IX.

## JURISDICTION.

- SECTION 111. Jurisdiction originally.  
112. What necessary to give jurisdiction.  
113. The venue.  
114. In justice courts.  
115. In circuit courts.  
116. In various states.

## CHAPTER X.

## THE COMPLAINT.

- SECTION 117. Complaint heretofore and at this time.  
118. Summons.  
119. What the complaint should contain.  
120. What description of premises required.

## CHAPTER XI.

## PLEADINGS—TRIAL—PROCEEDINGS.

- SECTION 121. Statutory provisions.  
122. Pleadings.  
123. Amendments.  
124. Plea of not guilty.  
125. Time to amend.  
126. Questions of practice.  
127. Whom affected by judgment.  
128. Defendant's conclusive possession.  
129. Mistake in date of complaint.  
130. Judgments where several holdings.  
131. Pursuing two remedies at one time.

## CHAPTER XII.

## THE TENANT CAN NOT DISPUTE THE LANDLORD'S TITLE.

- SECTION 132. Tenant's possession that of the landlord.  
133. Jury can not consider title.  
134. Tenant must restore possession to lessor.  
135. May show that lessor's title has terminated.  
136. What the tenant may show.  
137. Deeds may be read to show boundaries.  
138. The true meaning of the law.  
139. Can show source of title.  
140. Mistake, artifice, and fraud.  
141. The settled rule.

## CHAPTER XIII.

## EVIDENCE.

- SECTION 142. The proof necessary to support the action of forcible entry and detainer.

- SECTION 143. The proof in case of forcible entry.  
144. Wrongful withholding.  
145. In case of unoccupied lands.  
146. Holding over after termination of lease.  
147. Holding under contract of purchase.  
148. Holding after judgment of ouster.  
149. Defective description can not be supplied by parol proof.

## CHAPTER XIV.

### THE JUDGMENT IN FORCIBLE ENTRY AND DETAINER.

- SECTION 150. Statutory provisions.  
151. Judgment unauthorized if description indefinite.  
152. Judgment conclusive as to right of possession.  
153. Circuit court can render judgment on dismissal of appeal.  
154. The effect of a judgment in forcible entry and detainer.  
155. Conclusive only as to matters legally determined.  
156. Judgments by confession were heretofore sustained.  
157. They are now invalid.  
158. Judgments confessed only for bona fide debt due.  
159. Against whom judgments may be entered.  
160. Judgments as to sub-tenants.  
161. Judgments as regards the wife of defendant.

## CHAPTER XV.

### RESTITUTION.

- SECTION 162. Definition of term.  
163. Restitution—Concurrent remedies.  
164. Jury must sign verdict.  
165. Duty of officer in executing the writ.  
166. Unknown sub-tenants.  
167. Circuit court on appeal may remand case to justice to issue writ.

## CHAPTER XVI.

## THE TENANT'S REMEDIES.

- SECTION 168. Tenant may abandon premises for landlord's fault.  
169. May sue for breach of contract.  
170. No relief against rent except by stipulation in the lease.  
171. Defenses available to the tenant.  
172. Test questions for trial.  
173. Tenant's right to abandon premises.

## CHAPTER XVII.

## REPAIRS.

- SECTION 174. Time when repairs made.  
175. The common law rule as to repairs.  
176. The landlord's duties regarding repairs.  
177. What repairs made by tenant.  
178. Damages for personal injury on account of premises being dangerous.  
179. Damages by water.  
180. Defective plumbing and the results of sewer gas.

## USE AND OCCUPATION.

181. When tenants liable for use and occupation.  
182. Actions for rent and for use and occupation.  
183. Set-off and recoupment.  
184. Recoupment against rent.  
185. Set-off—When allowed.  
186. Damages.  
187. Damages for failing to repair.  
188. Re-entry by landlord.

## CHAPTER XVIII.

## FIXTURES.

- SECTION 189. Definition.  
190. Landlord's fixtures.

- SECTION 191. Tenant's fixtures.  
192. Removing fixtures.  
193. The intention as to fixtures.  
194. Cases in illustration.

## CHAPTER XIX.

## DISTRESS FOR RENT.

- SECTION 195. Rent defined.  
196. The warrant for distress.  
197. Proceedings for distress.  
198. Distress warrant subject to lien of execution already levied.  
199. Interest of chattel mortgagee.  
200. What property subject to levy.  
201. Amount claimed by landlord limits his recovery.  
202. The office of the warrant.  
203. The landlord's lien on crops.  
204. Trial in distress cases.  
205. Cases in illustration.  
206. Practice in distress-for-rent cases.

## CHAPTER XX.

## EVICTION.

- SECTION 207. Definition.  
208. Actual eviction.  
209. Constructive eviction.  
210. Cases in illustration.  
211. Effect and consequences of eviction.  
212. Taking from tenant part of premises.  
213. To discharge the tenant from rent he must abandon the premises.  
214. Particular cases stated.  
215. Threats by landlord against tenant.  
216. Suspension of rent.  
217. Damages for eviction.

## CHAPTER XXI.

## APPEALS AND APPEAL BONDS.

- SECTION 218. Statutory provisions as to bonds.  
219. Appeal bond indispensable.  
220. Bond—By whom approved.  
221. What gives the upper court jurisdiction.  
222. The penalty of the bond.  
223. Conditions of the appeal bond.  
224. What the bond should be.  
225. Bonds in larger amount may be required.  
226. Sureties on appeal bonds.  
227. Bonds must be in writing.  
228. What will discharge the surety.  
229. Co-sureties.  
230. The defense of the sureties.

## CHAPTER XXII.

## FORMS.

- Demand for possession.  
Notice to quit by an agent.  
Demand by an attorney.  
Notice to quit by the owner.  
Notice to terminate weekly tenancy.  
Ten days' notice to quit for default.  
Another form of notice to quit.  
Notice to quit for landlord by the agent.  
Landlord's five day notice.  
Sixty day notice to terminate tenancy.  
Another form of the same.  
Sixty day notice to be served by an agent.  
Thirty day notice to terminate a tenancy from month to month.  
A demand for possession disclosing the agent.  
Written authority to agent or attorney.  
Written authority to attorney to sue, etc.



Complaint in forcible entry and detainer in Illinois.  
Summons in forcible entry and detainer.  
Appeal bond in forcible entry and detainer.  
Writ of restitution.  
Agreement for a lease.  
Agreement not to obstruct lights.  
To renew a lease.  
Agreement of surety in lease.  
Agreement to let furnished apartments.  
Form of guarantee of rent, etc.  
Assignment and acceptance of lease.  
Assignment of lease.  
Consent to assignment.  
Assignment by lessor.  
New lease with full powers.  
Short country lease.  
Skeleton lease.



## CASES CITED.

---

### A

	PAGE
Abbott v. Kruse.....	37 Ill. App. 549..... 138, 139
Abbott's Law Dictionary.....	64
Ackland v. Sutley.....	9 Ad. and El. 879..... 132
Adlard v. Muldoon.....	45 Ill. 193..... 21
Allen v. Tobias et al.....	77 Ill. 169..... 95, 174
Alwood v. Mansfield.....	33 Ill. 452..... 166, 232
Amer. & Eng. Encey. of Law.....	Page 466..... 266
American Decisions, vol. 15.....	Page 64..... 186
Anderson et al. v. The Chicago M. & F. Ins. Co.....	21 Ill. 601..... 253
Anderson's Dictionary of Law.....	2 Bl. Com. 317..... 2
Ankeny v. Pierce.....	1 Ill. 262..... 164, 254
Arch. Landlord and Tenant.....	Page 66..... 121
Arms v. Burt.....	1 Vt. 306..... 16
Armson v. Forsythe.....	40 Ill. 49..... 270
Asay v. Sparr.....	26 Ill. 115..... 236
Atkins v. Byrnes.....	71 Ill. 326..... 38, 230
Atkinson v. Lester et al.....	2 Ill. 407.....
	.....69, 75, 100, 143, 148, 175

### B

Bailey v. Moore et al.....	21 Ill. 165..... 39
Baker v. Cooper.....	51 Me. 388..... 102
Baker v. Hays.....	28 Ill. 387..... 61, 97, 98
Ball v. Chadwick et al.....	46 Ill. 28..... 78, 103
Barlow v. Burns.....	40 Cal. 351..... 76
Bartlett v. Hitchcock.....	10 Ill. App. 87..... 87
Bainter v. Lawson.....	24 Ill. App. 634..... 233
Ball v. Peck.....	43 Ill. 482.....
	.....79, 116, 120, 122, 124, 134

		PAGE
Ballance v. Curtenius et al.	3 Gil. Ill. 449	72, 138, 146, 154, 157, 146
Baxley v. Collins	4 Blackf. (Ind.) 320	137
Baxter v. West	5 Daly R. 460	31
Beard v. Bricker	2 Swan (Tenn.), 50	84
Becar v. Flues	64 N. Y. 518	9
Beel v. Pierce	11 Ill. 92	136, 137, 145, 147
Beezley v. Burgett	15 Ia. 192	102
Bennett v. Bittle	4 Rawle, (Pa.) 399	249
Benjamin v. Heeney et al.	51 Ill. 492	206
Beidler, et al. v. Fish	14 Ill. App. 29	3
Bell v. Bruhn	30 Ill. App. 300	42, 122, 30, 191
Bells v. Anderson	38 Ill. App. 128	116
Berger v. Hoerner	36 Ill. App. 360	227
Berrington v. Casey	78 Ill. 317	5, 23
Bigler v. Furman et al.	58 Barbour, 555	167
Billings v. Chapin	2 Ill. App. 555	137, 138
Billings v. Lafferty	31 Ill. 318	264, 265
Bingham on Real Estate, 557		228
Birdsall v. Phillips	17 Wend. R. 472, 464	31
Bishop v. Elliott	11 Ex. R. 113	225
Bissell v. Lloyd et al.	100 Ill. 214	197, 202, 205
Blackstone Com. vol. 2, 41		228
Blake v. Ranous	25 Ill. App. 486	210
Blanchard et al. v. Pratt	37 Ill. App. 243	162
Blake v. Kurrus	41 Ill. App. 562	18
Bliss v. Gardner et al.	2 Ill. App. 422	41, 43
Black on Judgments, 663		187
Block v. Ebner	54 Ind. 544	197
Bloom v. Goodner	1 Ill. 63	51, 69, 194
B. & O. & C. R. R. Co. v. Ill. Cent. R. R. Co.	137 Ill. 9	13, 200
Borden v. Croak	33 Ill. App. 389	237
Borman v. Sandgren	37 Ill. App. 160	205
Boston R. R. Co. v. Ripley	13 Allen, (Mass.) 241	249
Bouv. Law Dic.		2, 28, 67
Bowlby v. Robinson et al.	45 Ill. App. 531	261
Bowman v. Mehring	34 Ill. App. 389	156
Boyd et al. v. Fraternity Hall Assn.	16 Ill. App. 574	148

		PAGE
Boyd v. Kocher.....	31 Ill. 295.....	264, 265
Bradley v. West.....	60 Mo. 59.....	113
Bradley v. West.....	68 Mo. 69.....	185
Brackensieck v. Vahle et al.....	48 Ill. App. 312.....	91, 194
Breher v. Reese.....	17 Ill. App. 545.....	10
Brooks v. Bruyn.....	18 Ill. 539.....	
	---76, 95, 97 166, 177, 180, 174	
Brown v. Smith.....	83 Ill. 291.....	17, 18, 192
Brown et al. v. Smith et al.....	24 Ill. 197.....	236
Brownell et al. v. Welch.....	91 Ill. 523.....	18
Brush v. Fowler.....	36 Ill. 53.....	77, 90, 190, 218, 217
Bryton v. Marston.....	33 Ill. App. 211.....	22
Bull v. Griswold.....	19 Ill. 631.....	8
Burns et al. v. Nash.....	23 Ill. App. 552.....	187, 140, 189
Burt v. French.....	70 Ill. 254.....	33

C

Cairo, etc., R. R. Co. v. Wiggins		
Ferry Co.....	82 Ill. 230.....	145, 146
Campbell v. Shields.....	11 Howerny, 165.....	249
Carroll v. City of Jacksonville.....	2 Brad. 481.....	154
Carroll v. Ballance.....	26 Ill. 9.....	50
Carson et al. v. Crigler.....	9 Ill. App. 83.....	43
Carson et al. v. Crigler.....	9 Ill. App. 83.....	44, 110, 187
Carter v. Marshall.....	72 Ill. 609.....	170
Casey v. McFalls.....	3 Sheed. 115.....	187
Casselberry v. Forguer.....	27 Ill. 170.....	80, 106
Cazzalo v. Chambers et al.....	73 Ill. 75.....	22, 23, 49
Center v. Gibner.....	71 Ill. 557.....	155, 263
Chadwick v. Parker.....	44 Ill. 326.....	32, 128
Chapman et al. v. Kirby.....	49 Ill. 24.....	32, 34, 35
Chapman v. Wright.....	20 Ill. 120.....	33
Chapman v. McGrew.....	20 Ill. 101.....	12, 45
Cheney v. Bonnell.....	58 Ill. 268.....	34, 35
Cheney v. Bonnell.....	58 Ill. 268.....	254
Chicago Legal News Co. v. Browne		
et al.....	5 Ill. App. 250.....	218

	PAGE
Chicago B. & Q. R. R. v. The President, etc., of Knox College.....	34 Ill. 202..... 129
Chicago Attachment Co. v. Davis	
Sewing Machine Co.....	142 Ill. 171..... 44
Church v. Brown.....	15 Ves. 265..... 41
Churchward v. Ford.....	2 H. & N. R. 445-450..... 31
City of Bloomington et al. v. Brophy.....	32 Ill. App. 400..... 69, 165
City of Chicago v. Garrity et al.....	7 Ill. App. 474..... 50
City of Peoria v. Simpson.....	110 Ill. 294..... 208
Clark v. Clark.....	58 Ill. 527..... 212
Clark v. Baker.....	44 Ill. 349..... 72, 74, 77, 105
Clark v. Ford.....	41 Ill. App. 199..... 219
Clark v. Jones.....	1 Denio R. 516..... 36
Clason v. Bailey.....	14 Johns. (N. Y.) 84..... 4
Clapp et al. v. Noble.....	84 Ill. 62..... 7, 181
Clevenger v. Dumaway.....	84 Ill. 367..... 232
Clemens v. Bloomfield.....	19 Mo. 118..... 4
Clinton Wire Cloth Co. v. Gardner et al.....	99 Ill. 151..... 8
Cluett et al. v. Sheppard.....	131 Ill. 636..... 22
Cobb v. Lavalley.....	89 Ill. 331..... 114
Coe v. Cassidy.....	72 N. Y. R. 133..... 270
Cochrane v. Tuttle.....	75 Ill. 361..... 28
Coford v. Bishop.....	11 Ill. App. 117..... 191
Commonwealth v. Shattuck.....	4 Cash, 141..... 64
Commonwealth v. Toram.....	2 Pars. (Pa.) Sel. Cas. 411..... 65
Commonwealth v. Kensey.....	2 Pars. (Pa.) Sel. Cas. 401..... 69
Commonwealth v. Biglow.....	3 Pick. (Mass.) 31..... 102
Consolidated Coal Co. v. Pears et al.....	39 Ill. App. 453..... 159
Cone v. Woodward.....	65 Ill. 477..... 33, 35
Cook v. Norton et al.....	48 Ill. 20..... 17
Cooney v. Hayes.....	4 Vt. 478..... 40
Conley v. Shiller.....	34 N. Y. Sup. 473..... 254
Consolidated Coal Co. of St. L. v. Schaefer.....	31 Ill. App. 364..... 122, 123
Copeland v. Parker.....	4 Mich. 660..... 46

	PAGE
Coppinger et al. v. Armstrong.....	8 Ill. App. 210; 5 Ill. App. 637.....
	41, 49, 165
Corrigan et al. v. City of Chicago	
et al.....	144 Ill. 537.....
	170
Coursen v. Browning et al.....	86 Ill. 57.....
	272
Coverdale v. Curry.....	48 Ill. App. 213.....
	70
Cox v. Cunningham.....	77 Ill. 545.....
	39, 79, 96
Cox v. Jordan.....	86 Ill. 560.....
	230, 232, 243
Cozens v. Stevenson.....	5 S. & R. 424.....
	22, 49
Cram v. Dresser.....	2 Sandf. R. 120.....
	218
Crane v. Hardman.....	4 E. D. Smith R. 339.....
	218
Creighton v. Sanders.....	89 Ill. 543.....
	124
Croff v. Ballinger.....	18 Ill. 200.....
	69, 71, 173 174, 175, 182
Cunnea v. Williams.....	11 Ill. App. 72.....
	230, 233
Currey v. Davis.....	1 Houst. (Del.) 598.....
	11

## D

Daggitt v. Mensch et al.....	41 Ill. App. 403.....	99
Dale v. Doddridge.....	9 Neb. 138.....	186
Davenport et al. v. Haynie et al.....	30 Ill. App. 59.....	107
Davis v. Lennen.....	24 N. E. Rep. 885.....	185
Davis v. Woodward.....	19 Minn. 137.....	68
Devell v. Binkerhoff.....	23 Mich. 371.....	139
DeWitt v. Pierson.....	122 Mass. 8.....	250
Dickason v. Dawson.....	85 Ill. 53.....	88, 90, 129
Dickenson v. McGill.....	9 Cal. 47.....	152
Dickinson v. Petrie.....	38 Ill. App. 155.....	123
Dickson v. Haley.....	16 Ill. 145.....	212
Dills v. Stobie et al.....	81 Ill. 202.....	8, 29, 126, 131
Disselhorst v. Cadogan et al.....	21 Ill. App. 179.....	42
Dixon v. Buell.....	21 Ill. 203.....	41
Dixon v. Haley.....	16 Ill. 145.....	18, 84
Dixon v. Nicholls et al.....	39 Ill. 372.....	230
Doe v. McMahan.....	3 Scam. (Ill.) 12.....	4
Donnelly v. Thieben.....	9 Bradw. 495.....	227
Doty v. Burdick.....	83 Ill. 473.....	
	44, 61, 68, 70, 92, 111, 164, 165	

	PAGE
Doran v. Gillespie.....	54 Ill. 366.....79, 116, 117, 122, 128, 129, 155, 159
Dotson v. The State.....	6 Cald. (Tenn.) 545..... 62
Dougherty v. Matthews.....	35 Mo. 520..... 42
Dow v. Blake.....	15 Ill. App. 89..... 237
Doyle v. Hallen.....	31 Minn. 515..... 185
DuBignon v. Tufts.....	63 Ga. 59..... 141
Ducker v. Rapp.....	41 N. Y. Sup. Ct. 235..... 268
Dudley et al. v. Lee.....	39 Ill. 339..... 49, 70, 89, 97, 160, 200
Dunbar v. Bonesteel.....	3 Scam. (Ill.) 32..... 167
Dunham v. Carter.....	2 Stew. (Ala.) 496..... 141
Dunn v. Jaffray.....	36 Kansas, 408..... 51
Dunne v. Trustees of Schools.....	39 Ill. 578..... 16, 115, 123, 125, 145, 146, 262
Dunstedter v. Dunstedter.....	77 Ill. 580..... 75

## E

Eames v. Preston.....	20 Ill. 389..... 4
Easton v. Mitchell.....	21 Ill. App. 189..... 16
Edge v. Stafford.....	1 Tyr. 293..... 27
Edge v. Stafford.....	1 Compton & Jarvis, 391..... 27
Edgerton v. Page.....	20 N. Y. R. 281..... 256
Edwards v. Candy.....	14 Hun (N. Y. Sc.) 596..... 256
Eichhorn v. Peterson et al.....	16 Ill. App. 601..... 25
Ely v. Ely.....	80 Ill. 532..... 27, 205
Eldredge v. Bell.....	64 Ia. 125..... 34, 40, 47
Eldridge v. Holway.....	18 Ill. 445..... 124
Elliott v. Bishop.....	10 Ex. R. 496..... 225
Elliott v. Atkin.....	45 N. H. 30..... 249
Emerson v. Sturgeon.....	59 Mo. 404..... 68
Emmons v. Scutler.....	115 Mass. 367..... 18
Empson v. Soden.....	4 B. & Ab. R. 655..... 226
Ennis v. Lamb.....	10 Ill. App. 447..... 191, 195
Epsen et al. v. Hinchliffe.....	131 Ill. 468..... 23, 189
Eten v. Luyster.....	60 N. Y. 252..... 48
Etheridge v. Osborn.....	12 Wend. (N. Y.) 529..... 245
Evans v. Winona Lumber Co.....	30 Minn. 515..... 9

## F

Fabri v. Bryan et al.....	80 Ill. 182..... 73, 152
---------------------------	--------------------------



	PAGE
Fabri v. Cunio.....	1 Ill. App. 240..... 191
Fairbank v. Streeter.....	142 Ill. 226..... 261, 266, 267
Fanning v. N. W. Life Ins. Co.....	6 Ill. App. 536..... 157
Fairman v. Beal.....	14 Ill. 244..... 111, 174
Farnam v. Hahman.....	90 Ill. 312..... 124
Fenton et al. v. Strong.....	37 Ill. App. 58..... 237
Field et al. v. Herrick et al.....	101 Ill. 110..... 24, 252
Field v. Herrick et al.....	5 Ill. App. 54..... 49
Fink et al. v. Disbrow.....	69 Ill. 76..... 155, 198
Finney v. Harding.....	32 Ill. App. 98..... 237
First Nat. Bank of Joliet v. Adam et al.....	138 Ill. 483..... 231
Fish v. Benson.....	71 Cal. 428..... 186
Fisher v. Deering.....	60 Ill. 114..... 38
Fisher v. Smith.....	48 Ill. 184..... 90
Flood v. Flood.....	1 Allen (Mass.), 217..... 18
Fortier v. Ballance.....	5 Gil. (Ill.) 41..... 173
Foss v. Foss.....	2 Bradw. 411..... 173
Frank v. Taubman.....	31 Ill. App. 592..... 127
Frazier et al. v. Caruthers et al.....	44 Ill. App. 61..... 37, 48
French v. Miller.....	126 Ill. 611..... 65, 139
French v. Willer.....	126 Ill. 611..... 188, 189
Fusselman v. Worthington.....	14 Ill. 135..... 166, 172

G

Gable v. Wetherholt.....	116 Ill. 313..... 168
Gallaway v. Kirby.....	9 Ill. App. 501..... 201
Gartside et al. v. Outley et al.....	58 Ill. 210..... 19
Gardner v. Ketcher.....	3 Hill, 330..... 22, 49
Gazzolo v. Chambers et al.....	73 Ill. 75..... 23, 49
Gerlach v. Walsh.....	41 Ill. App. 83..... 146
Gerzebech v. Lord.....	32 N. J. L. 240..... 204
Gilholley v. Washington.....	4 N. Y. 217..... 250, 255
Gilliam v. Coon et al.....	10 Ill. App. 43..... 213
Ginn et al. v. Rogers.....	4 Giln. (Ill.) 131..... 135, 138, 139, 141
Godard et al v. Lieberman.....	17 Ill. App. 366..... 190
Goldsborough v. Gable.....	140 Ill. 269..... 6, 13
Gorman v. Steed.....	1 W. Va. 1..... 141

	PAGE
Gould et al. v. Hendrickson.....	9 Ill. App. 171, 79, 161, 217, 218
Gradle v. Warner.....	140 Ill. 123..... 101
Gray v. Gray.....	3 Litt. 465..... 97
Greenaway v. Adams.....	12 Vesey, 395..... 47
Greton v. Smith.....	33 N. Y. R. 245..... 256
Gridley v. City of Bloomington.....	68 Ill. 47..... 208
Griffin v. Kirk.....	47 Ill. App. 258..... 50, 166, 167
Griffin v. Knisely.....	75 Ill. 411..... 200
Green et al. v. Hague.....	10 Ill. App. 598..... 208, 210
Green v. Hague.....	10 Bradw. 598..... 27
Grommes et al. v. St. Paul Tr. Co. et al.....	147 Ill. 634..... 36, 43, 44, 45, 47, 198, 215, 222, 252, 256, 257
Grymes v. Boweren.....	6 Bing. R. 437..... 225

## H

Haley v. Palmer.....	9 Dana (Ky.), 320..... 113
Halley et al. v. Metealf.....	12 Ill. App. 141..... 6, 230
Hallis v. Burns.....	100 Pa. St. 206..... 8, 10
Halligan v. Wade.....	21 Ill. 470..... 248, 250, 251, 252, 253
Hansen v. Dennison et al.....	7 Ill. App. 73..... 242
Hansen v. Meyer et al.....	81 Ill. 321..... 45
Hannigan v. Massler et al.....	44 Ill. App. 117..... 139
Hard v. Moon.....	6 Cal. 161..... 139
Hardin v. Forsythe et al.....	99 Ill. 312..... 166, 167
Harlan v. Scott.....	2 Scam. 65..... 154, 161, 194, 265
Hardisty v. Glenn.....	32 Ill. 62..... 92, 93, 110, 174
Hare v. Stegall.....	60 Ill. 380..... 232, 235, 241
Harms et al. v. McCormick et al.....	132 Ill. 104..... 20
Harms v. Salen et al.....	79 Ill. 460..... 243
Harrison v. Hill.....	37 Ill. App. 32..... 50
Haskins et al. v. Haskins.....	67 Ill. 446..... 83, 136, 140, 143, 147, 185
Hassett v. Johnson.....	48 Ill. 69..... 95, 102, 111, 176
Hatfield v. Fullerton.....	24 Ill. 278..... 49
Hatfield v. Fullerton.....	28 Ill. 278..... 232
Haupt v. Pittaluga.....	6 Bush. 493..... 101

	PAGE
Haven & White v. Wakefield et al. . . . .	39 Ill. 509. . . . . 2, 220
Havens v. Bickford. . . . .	9 Humph. (Tenn.) 673. . . . . 65
Hawkins v. Harding. . . . .	37 Ill. App. 565. . . . . 273
Hays v. Porter. . . . .	27 Tex. 92. . . . . 98
Hayes v. Lawyer. . . . .	38 Ill. 182. . . . . 39
Hayner et al. v. Smith et al. . . . .	63 Ill. 430. . . . . 245, 249, 252, 254, 256
Heissler et al. v. Stose. . . . .	33 Ill. App. 39. . . . . 197
Herman on Estoppel, sec. 868. . . . .	169
Hermion v. Larned. . . . .	58 Iowa, 169. . . . . 180
Herron v. Gill. . . . .	112 Ill. 247. . . . . 233
Herrell et al. v. Sizeland et al. . . . .	81 Ill. 457. . . . . 16, 19, 127, 315
Hersey et al. v. Westover. . . . .	11 Ill. App. 197. . . . . 118
Hersey v. Westover. . . . .	11 Bradw. 191. . . . . 181
Hervie v. Turner. . . . .	46 Mo. 444. . . . . 186
Hewitt v. Templeton et al. . . . .	48 Ill. 371. . . . . 92
Hickmar v. Marl. . . . .	55 Ind. 551. . . . . 204
Hilliard v. Carr. . . . .	6 Ala. 557. . . . . 160
Hinman v. Kitterman. . . . .	40 Ill. 254. . . . . 155
Hilbourn v. Fogg et al. . . . .	99 Mass. 11. . . . . 166, 172
Hillary v. Gay. . . . .	6 C. & P. 284. . . . . 68
Hisey v. Troutman. . . . .	84 Ind. 115. . . . . 11
Hoagland et al. v. Crum. . . . .	113 Ill. 365. . . . . 125
Hoffman v. Reichert et al. . . . .	31 Ill. App. 558. . . . . 106, 109, 111
Holder v. Soulby. . . . .	6 Jur. N. S. 1031; 29 L. J. C. P. 246; 8 W. R. 438; C. B. N. S. 254. . . . . 30
Holladay et al. v. Bartholomæ et al. . . . .	11 Ill. App. 206. . . . . 118, 234
Home Life Ins. Co. v. Sherman. . . . .	46 N. Y. 370. . . . . 249
Hoops v. Meyer. . . . .	1 Nev. 433. . . . . 141
Hope v. Eddington. . . . .	Lalor, 43. . . . . 247, 248
Hopkins v. Buck. . . . .	3 A. K. Marsh, 110. . . . . 68
House v. Camp. . . . .	32 Ala. 541. . . . . 98
House v. Wilder et al. . . . .	47 Ill. 510. . . . . 157
Howdyshell et al. v. Gary. . . . .	21 Ill. App. 288. . . . . 232
Howe v. Clark. . . . .	23 Ill. App. 145. . . . . 237
Howell v. Ashmore. . . . .	2 Zab. 265. . . . . 168
Hubner v. Feige. . . . .	90 Ill. 208. . . . . 103.

		PAGE
Huftalin v. Misner.....	70 Ill. 55.....	155
Huftalin v. Misner.....	70 Ill. 205.....	
	61, 67, 112, 117, 130, 174, 180	
Huggins v. Halligan.....	46 Ill. 173.....	105
Hughes v. Van Stone.....	20 Mo. App. 637.....	23
Hughes v. Streeter.....	24 Ill. 647.....	185
Hunt v. Morton.....	18 Ill. 75.....	19, 20
Hunter et al. v. Whitfield et al.....	89 Ill. 229.....	238, 242

## I

Hlingworth v. Burley.....	33 Ill. App. 394.....	50
Ill. C. R. R. Co. v. B. & O. & C. R. R. Co.....	23 Ill. App. 531.....	156
International Bank v. Pappers.....	105 Ill. 491.....	270
Indiana, B. & W. R. R. Co. v. Allen.....	113 Ind. 308.....	185
I. C. R. R. Co. v. Thompson.....	116 Ill. 159.....	213
Ives v. Van Eppes.....	2 Wend. 165.....	216

## J

Jackson v. Groat.....	7 Cow. (N. Y.) 285.....	40, 47
Jackson v. Silvernail.....	15 Johns. 278.....	46
Jackson v. Harrison.....	17 Johns. 66.....	46
Jackson v. Eddy.....	12 Mo. 209.....	249
Jackson v. Odell.....	9 Daily R. 371.....	220
Jackson v. Warren.....	32 Ill. 331.....	
	85, 89, 100, 101, 104, 136, 155	
Jamison v. Graham.....	57 Ill. 94.....	94, 102, 108
Jenney v. Jackson et al.....	6 Ill. App. 32.....	226
Jex v. Jacob.....	19 Han. (N. Y. Sc.) R. 105.....	215
Johnson v. Crane et al.....	22 Ill. App. 366.....	187
Johnson v. Fullerton.....	44 Pa. St. 466.....	195
Johnson v. Bantock.....	38 Ill. 111.....	89, 180
Johnston v. Prussing.....	4 Ill. App. 575.....	234
Johnson v. West.....	44 Ark. 535.....	65
Jones v. Gray.....	60 Cal. 508.....	102

## K

Kassing et al. v. Keohane.....	4 Ill. App. 460.....	96
Kassing et al. v. Keohane.....	4 Ill. App. 460.....	234

	PAGE
Keary v. Baker.....	33 Mo. 603..... 267
Keating v. Springer.....	146 Ill. 481..... 157, 158
Keegan v. Kauiaaire.....	12 Ill. App. 484..... 182, 218
Keegan v. O'Callaghan.....	35 Ill. App. 142..... 161
Keernan v. Germain.....	61 Miss. 498..... 201
Kent's Comm. vol. 4, 111, 112, 1.....	121
Kepley v. Luke.....	10 Ill. App. 403..... 88, 136, 140
Kepley v. Luke.....	106 Ill. 395..... 156, 166
Kessinger v. Whittaker et al.....	82 Ill. 22..... 163
Kilburn v. Ritchie.....	2 Cal. 145..... 126
King v. Lawson.....	98 Mass. 309..... 17, 185
Kingsbury v. Perkins et al.....	15 Ill. App. 240..... 88
Kinney v. Jones et al.....	37 Ill. App. 615..... 261
Kinsley v. Ames.....	2 Met. (Mass.) 29..... 17
Kinzie v. Chicago.....	2 Scam. Ill. 187..... 49
Klingensmith v. Faulkner.....	84 Ind. 331..... 147
Knight v. Mitchell.....	67 Ill. 86..... 11
Knight v. Knight et al.....	3 Ill. App. 206..... 101, 164
Koob v. Ammana.....	6 Ill. App. 160..... 242
Kratz v. Buck.....	111 Ill. 40..... 88
Kruse v. Kruse.....	68 Ill. 188..... 238
Kurrus v. Seibert.....	11 Ill. App. 319..... 208

L

Ladd v. Griswold.....	4 Gil. 25..... 51
Laird v. Winters.....	27 Texas, 440..... 98
Lake v. Campbell.....	18 Ill. 106..... 3
Lake v. Frasher.....	79 Via. 409..... 152
Lambert v. Borden.....	16 Ill. App. 431..... 158
Langford v. Selmes.....	3 Kay & J. 220..... 169
Lathrop v. Clewiss.....	63 Ga. 282..... 228
Leadbeater v. Roth.....	25 Ill. 587..... 252
Leary v. Pattison.....	66 Ill. 203..... 143, 155, 159
Leech v. Koenig.....	55 Mo. 451..... 39
Lehman v. Whittington.....	8 Ill. App. 74.....
	.....87, 90, 116, 117, 122, 173
Lehman et al. v. Best et al.....	30 Ill. App. 323..... 227
Leindecker et al. v. Waldron.....	52 Ill. 283..... 77, 190
Leiter v. Pike et al.....	127 Ill. 287..... 5, 42, 50

	PAGE
Leshner v. Sherwin.....	86 Ill. 420... 82, 83, 84, 178, 181
Leopold v. Judson et al.....	75 Ill. 536..... 253, 256
Libbey v. Tolford.....	48 Me. 316..... 9
Linde v. Hough.....	27 Barb. 415..... 46
Lindley v. Dakin.....	13 Ind. 388..... 39
Lindley v. Miller.....	67 Ill. 244..... 236, 240, 241, 244
Little et ux. v. Dyer.....	35 Ill. App. 35..... 188, 211
Livingston v. Miller.....	8 N. Y. R. 283..... 229
Loach v. Farnam et al.....	90 Ill. 368..... 3
Louis v. Stitle.....	2 Litt. 294..... 97
Louis et al. v. Fish.....	40 Ill. App. 372..... 24
Lunn v. Gage.....	37 Ill. 19..... 201, 203
Lynch v. Baldwin.....	69 Ill. 210.....
	..... 13, 234, 250, 252, 254, 256

## Mc

McCartney v. McMullen.....	38 Ill. 237..... 74, 75, 76,
	92, 93, 96, 109, 164, 176
McCartney v. Hunt et al.....	16 Ill. 76..... 77, 82, 98
McCoull v. Herzberg.....	33 Ill. App. 542..... 205, 211
McDevitt v. Lambert.....	80 Ala. 536..... 25
McFarlane v. Pierson.....	21 Ill. App. 566..... 207, 254
McFarlane v. Williams.....	107 Ill. 33..... 6, 14, 19
McGlynn v. Moore.....	25 Cal. 348..... 151
McGillick v. McAllister.....	10 Ill. App. 40..... 235
McHan v. Stansell.....	39 Ga. 197..... 111
McKinney v. Peck.....	28 Ill. 174..... 19
McKeage v. Hanover F. Ins. Co.....	81 N. Y. R. 38..... 225
McMillan v. Solomon.....	42 Ala. 356..... 28
McNair v. Schwartz.....	16 Ill. 24..... 212

## M

Mackin et al. v. Blythe.....	35 Ill. App. 216..... 233
Maloney v. Shattuck.....	15 Ill. App. 44..... 147
Mann v. Brady.....	67 Ill. 95..... 174
Mann v. Brady.....	67 Ill. 95..... 107, 109
Mason v. Finch.....	2 Ill. (1 Scam.) 495... 98, 107, 217
Mason v. Powell.....	38 N. J. 576..... 68

	PAGE
Mason v. Finn.....	13 Ill. 525..... 226
Mason v. Tiffany.....	45 Ill. 392..... 51
Mason v. Grey.....	36 Vt. 308..... 17, 18
Mattocks v. Helm.....	5 Litt. 185..... 186
Mendel v. Fink.....	8 Ill. App. 378..... 209, 210, 219
Messingill v. Boyles.....	11 Humphrey, 112..... 77
Mickle v. Miles.....	31 Pa. St. 20..... 13
Miller v. James.....	36 Ill. 399; 67 Ill. 395..... 239, 240
Miller et al. v. White.....	80 Ill. 580..... 81
Miller et al. v. White.....	80 Ill. 580..... 80, 194, 195
Miller v. Ridgely.....	19 Ill. App. 306..... 6
Minor v. Sharon.....	112 Mass. R. 477..... 220
Minturn v. Burr.....	20 Cal. 48..... 104
Mitchell v. Davis.....	23 Cal. 381..... 187
Mitchell v. Plant.....	31 Ill. App. 128..... 205, 219
Monsen v. Stevens.....	56 Ill. 335..... 84
Montanye v. Wallahan.....	84 Ill. 355..... 251
Moore v. Smith.....	24 Ill. 513..... 227
Morey et al. v. Pierce.....	14 Ill. App. 91..... 211
Morgan v. Smith.....	70 N. Y. R. 537, 543..... 271
Morris v. Tillson et al.....	81 Ill. 607..... 248, 249
Mueller v. Newell.....	29 Ill. App. 192..... 96
Murphy v. Williamson.....	85 Ill. 149..... 129
Murphy v. Lucas.....	2 O. 255..... 137
Murphy v. Dwyer.....	11 Ill. App. 156..... 156, 181
Murr v. Glover et al.....	34 Ill. App. 373..... 231
Murry v. Harper.....	3 Ala. 374..... 196

N

Nash v. Berkmeir.....	83 Ind. 536..... 10
Nave v. Benney.....	22 Ala. 382..... 22
Neill et al. v. Chesson.....	55 Ill. App. 266..... 42
Newfeld v. Beidler.....	37 Ill. App. 34..... 79
Nicholson et al. v. Walker et al.....	4 Ill. App. 404..... 87, 90
Nicholson et al. v. Walker et al.....	4 Ill. App. 404..... 169
Nixon v. Noble.....	70 Ill. 32..... 117
Norris v. Pierce.....	47 Ill. App. 469..... 160
Norwood v. Kirby.....	70 Ala. 397..... 187
N. W. Brg. Co. v. Manion.....	47 Ill. App. 627..... 159

## O

	PAGE
Oakes v. Oakes.....	16 Ill. 106..... 213
Ogildie v. Hull.....	5 Hill R. 52..... 256
Olcott v. Dunklee.....	16 Ver. 478..... 20
Olmstead v. Burke.....	25 Ill. 86..... 258
O'Hara v. Jones.....	46 Ill. 288..... 235, 242
O'Malla et al. v. Glynn.....	42 Ill. App. 51..... 156, 237, 242
Ottumwa Woolen Mills v. Hawley.....	44 Ia. 57..... 50
Oswald v. Mollet.....	29 Ill. App. 449..... 38
Oswald v. Wolf.....	129 Ill. 200..... 209
Otis v. May.....	30 Ill. App. 581..... 226

## P

Packard v. C. C. C. & St. L. R. R. Co.....	46 Ill. App. 244..... 16
Page et al. v. De Puy.....	40 Ill. 506..... 61
Paine et al. v. Irwin.....	44 Ill. App. 105..... 206
Palmer v. Ford.....	70 Ill. 369..... 32
Palmer v. Forbes.....	23 Ill. 301..... 226
Pardy v. Rakestraw et al.....	13 Ill. App. 480..... 85
Patchell et al. v. Johnston.....	64 Ill. 305..... 32
Patchell & Turner v. Johnston.....	64 Ill. 305..... 78
Patterson et al. v. Graham.....	140 Ill. 531.....
	113, 126, 145, 246, 254, 256
Patterson et al. v. Hubbard et al.....	30 Ill. 201..... 77
Pearson v. Herr.....	53 Ill. 144.....
	94, 95, 110, 113, 168, 174, 180
Peck v. Hiller.....	31 Barb. R. 171..... 245, 246
Peck v. Ledwidge.....	25 Ill. 109..... 206, 207
Peck v. Scoville Mfg. Co.....	43 Ill. App. 360..... 205
Pensoneau v. Bertke.....	2 Ill. 161..... 95
People v. McAdam.....	84 N. Y. 287..... 104
Peterson v. Sweet.....	13 Ill. App. 255..... 170
Pettyman v. Unland et al.....	77 Ill. 206..... 238, 242
Phelps v. Randolph.....	147 Ill. 335..... 73, 79, 164
Phillips v. Sampson.....	2 Head (Tenn.), 429..... 171
Pitt v. Laming.....	4 Camp. 77..... 27
Pitt et al. v. Swearingen.....	76 Ill. 250..... 263, 264
Platt v. Farney.....	16 Ill. App. 216..... 211



	PAGE
Pleasance v. Claghorn.....	2 Miles (Pa.), 302..... 10
Post v. Bohner.....	36 N. W. Rep. (Neb.) 208..... 116
Poppers v. Meagher.....	148 Ill. 192..... 22, 134, 163, 219
Poppers v. International Bank.....	10 Ill. App. 531..... 264
Pratt v. Hone et al.....	10 Ill. App. 633..... 76, 94
Powers v. David.....	6 Ala. 9..... 161
Prehman v. Stifel.....	41 Mo. 184..... 175
Prickett v. Ritter.....	16 Ill. 96..... 6, 17, 116, 121, 124, 126, 128
Prendergast v. Young.....	1 Foster, 238..... 22
Prescott v. Overstatter.....	85 Pa. St. 534..... 197
Prettyman v. Walston et al.....	34 Ill. 175..... 164, 221
Preston v. Kehoe.....	10 Cal. 445..... 107
Preston et al. v. Zahl.....	4 Ill. App. 423..... 89, 90
Price v. P. & F. W. C. R. R. Co.....	34 Ill. 13..... 214, 246
Proctor et al v. Taws et al.....	115 Ill. 138..... 17

## Q

Quinlan v. Bonte.....	25 Ill. App. 240..... 7
-----------------------	-------------------------

## R

Ragor v. McKay et al.....	44 Ill. App. 79..... 160, 165
Rains v. Oshkosh.....	14 Wis. 372..... 107
Randall v. Lynch.....	2 East. 182..... 20
Reed v. Bartlett.....	9 Ill. 267..... 39
Reed v. Grant.....	4 Cal. 176..... 81
Reed v. Hawley.....	45 Ill. 40..... 77, 80, 81, 105, 123
Rees v. Lawlass.....	6 Litt. 184..... 106
Reeves v. Hyde.....	14 Ill. App. 233..... 216
Reader et al. v. Purdy et ux.....	41 Ill. 284..... 61, 63, 69, 71
Reichenbacher v. Paheyer.....	8 Bradw. 217..... 27, 207
Rensen v. Conklin.....	18 Johns. R. 447..... 229
Rev. Stat. 1874, p. 535.....	86
Rev. Stat., chap. 57, sec. 5.....	143
Rex v. Nichols.....	1 Kenyon, 512..... 64
Reynolds v. Gage.....	91 Ill. 125..... 125, 134, 140, 144
Reynolds v. Thomas et al.....	17 Ill. 207..... 106, 161
Rice v. Brown.....	77 Ill 549..... 87, 90, 96, 102, 113

	PAGE
Richardson v. Richardson.....	75 Mass. 213..... 28
Rider v. Bagley.....	41 Ill. 365..... 262
Ridgley v. Stillwell.....	27 Mo. 128..... 230
Rigg v. Cook.....	4 Gil. (Ill.) 336..... 164
Riverside Co. v. Townshend et al.....	120 Ill. 9..... 186
Robertson v. Robertson.....	2 B. Mon. (Ky.) 235.. 196
Robinson v. Crummer.....	5 Gil. (Ill.) 218..... 63, 99, 217
Robinson v. Berry.....	21 Ga. 183..... 40
Rosenbaum v. Gunter.....	2 E. D. Smith R. 415.. 269
Rowland v. Hewitt.....	19 Ill. App. 450..... 158
Rucker v. Wheeler et al.....	39 Ill. 436..... 267
Ryan v. Kirchberg.....	17 Ill. App. 132..... 8
Ryan v. Kirchberg.....	17 Ill. App. 132..... 158

## S

Sanborn v. Haynex et al.....	26 Ill. App. 335..... 212, 213
Schaumtoeffel v. Belm.....	77 Ill. 569.... 137, 147, 159, 180
Scheidt v. Belz et al.....	4 Ill. App. 431..... 46, 50, 51
Schreider et al. v. Chicago & Evans- ton R. R. Co.....	115 Ill. 340..... 125
Seem v. McLees.....	24 Ill. 192..... ..... 122, 124, 126, 160, 174, 198
Sexton v. Chicago Storage Co. et al.....	129 Ill. 318..... 14, 47, 198
Sexton et al. v. Carley.....	147 Ill. 269..... 164, 170
Shackelford v. Bailey.....	35 Ill. 387..... 185
Sheetz v. Baker.....	38 Ill. App. 349..... 231, 233
Sherman et al. v. Dutch.....	16 Ill. 283..... 45
Sheridan v. Beardsley et al.....	89 Ill. 477..... 262, 263
Shepherd v. Cummings.....	1 Coldw. (Tenn.) 354.. 9
Shoudy v. School Directors.....	32 Ill. 290..... 92
Shumick et al. v. Thompson.....	25 Ill. App. 319, 151, 156, 158, 268
Shinkell v. Letcher et al.....	40 Ill. 48..... 269
Silvey v. Simmer.....	61 Mo. 253..... 139
Silverman v. Chase, Exr.....	90 Ill. 42..... 51
Simons v. Jenkins.....	76 Ill. 479..... 118
Smith v. Kinkaid.....	1 Ill. App. 620..... 207, 213
Smith v. Marrable.....	11 M. & W. 5..... 30
Smith v. Marrable.....	11 M. & W. R. 5 P. R. 220
Smith et al. v. McLean et al.....	22 Ill. App. 451..... 198

	PAGE
Smith v. The People.....	99 Ill. 445..... 186
Smith v. Hellinback et al.....	51 Ill. 223..... 92, 93
Smith v. Killeck.....	5 Gilm. 293..... 115, 145
Smith v. Reed.....	52 How. (N. Y.) Pr. 14..... 30
Smith v. Hoag.....	45 Ill. 250..... 73, 92, 167, 174, 175
Snyder v. Norris.....	2 M. & S. 286..... 4
Sourwine v. Truscott.....	17 Hun (N. Y.), 432..... 10
Spear v. Lomax.....	42 Ala. 516..... 102
Spinney v. Barbe.....	43 Ill. App. 585..... 226
Spurch v. Forsyth.....	40 Ill. 438..... 92, 94, 143, 154
State v. Pierson.....	2 N. H. 550..... 97
State v. Walker.....	5 Sneed. (Tenn.) 259..... 64
Star v. Stark.....	1 Sawy. 275..... 185
Steele v. Grand T. Junction Ry. Co.....	125 Ill. 385..... 151
Stewart et al. v. Munford.....	91 Ill. 58..... 24, 131
Stiner v. Priddy.....	28 Ill. 179..... 136, 141
Stillman v. Palis.....	134 Ill. 532..... 127, 146, 165
Stobie et al. v. Dills.....	62 Ill. 432..... 24
Stoe v. Russell et al.....	36 Ill. 18..... 198
St. John v. Quitzow.....	72 Ill. 334..... 167
St. Louis Nat. Stock Yards v. Wiggins Ferry Co.....	102 Ill. 514..... 63
Stolberg v. Ohmnacht.....	50 Ill. 442..... 138
Stolberg v. Ohmacht.....	50 Ill. 242..... 261
Stohecker v. Barnes.....	21 Ga. 430..... 202
Stuart v. Hamilton.....	66 Ill. 253..... 34
Stubblefield v. Soule.....	21 Ill. App. 154..... 217
Stubbings v. Village of Evanston.....	136 Ill. 37..... 254
Sutherland v. Goodnow et al.....	108 Ill. 528..... 14, 47
Sullivan v. Ivey.....	2 Sneed. (Tenn.) 487..... 84

T

Tanton v. Van Alstine.....	24 Ill. App. 405..... 125
Taylor Landlord and Tenant.....	Sec. 66 and 67.....
	... 27, 30, 31, 49, 131, 133, 215
Taylor v. Bailey.....	74 Ill. 178..... 209, 210
Taylor v. Taylor.....	64 Ind. 356..... 268
Taylor v. White.....	1 T. B. Mon. (Ky.) 37..... 173
Taylor et al. v. Koshetz.....	88 Ill. 479..... 219
T. Est. v. Devers.....	2 Black F. 80..... 194

	PAGE
Teeney v. Child.....	1 Maule & Selwin, 262 16
Thielman et al. v. Carr et al.....	75 Ill. 385..... 226
Thorn v. Reed.....	1 Ark. 480..... 126
Thome v. Luckett.....	5 C. B. 38..... 29
Thompson v. Mead.....	67 Ill. 395..... 238, 240, 242
Thomson v. McCormick.....	136 Ill. 135..... 190
Thomasson v. Wilson.....	46 Ill. App. 398.....
	70, 73, 97, 102, 104, 164, 165, 196
The Chicago Stove Co. v. Wheeler.....	14 Ill. App. 112..... 207
The U. B. Manfg. Co. v. Lindsay.....	10 Ill. App. 583..... 208
Tiernan v. Hinman.....	16 Ill. 400..... 22
Tilghman et al. v. Little.....	13 Ill. 239..... 169
Tobey Furn. Co. v. Rowe.....	18 Ill. App. 293..... 51
Toler v. Seebrook.....	39 Ga. 14..... 228, 230
Tomle v. Hempton.....	129 Ill. 379..... 208
Tompson v. Sornberger.....	59 Ill. 326.....
	63, 92, 93, 110, 143, 157, 174
Townsend v. Gilsey.....	7 Appr. (Ms.) 59..... 255
Townsend v. Brooks.....	5 Cal. 52..... 141
Tolman et al. v. Green et al.....	39 Ill. 225..... 266, 267
Tucker v. Phillips.....	5 Metcalf (Ky.), 416.. 63

## V

Vance v. Funk.....	3 Ill. 263..... 4
Van Hook v. Story.....	4 Humphries (Tenn.), 59 99
Vanarden v. Decker.....	Paine, 108..... 106
Vall v. Butler.....	49 Cal. 74..... 113
Vansant v. Allmon.....	23 Ill. 30..... 163
Vanderhurell v. Storrs.....	3 Conn. 203..... 212
Van Rensselaer v. Jones.....	5 Denio R. 449, 453..... 229
Venmun v. Venmun.....	56 Ill. 230..... 117, 121, 124, 134
Voltz v. Harris et al.....	40 Ill. 155..... 268

## W

Wade v. Newbern.....	77 N. C. 460..... 4
Wade v. Halligan.....	16 Ill. 507..... 23, 203, 244
Walker v. McGill.....	40 Arkansas 38..... 185
Walker v. Shoemaker.....	4 Hun (N. Y. S. C.),
	R. 579..... 218

# CASES CITED.

XXXV

	PAGE
Walker v. Wilson.....	52 Ill. 352 ..... 9
Walker et al. v. Tucker et al.....	70 Ill. 527..... 23, 251
Walker v. McDonald.....	28 Ill. App. 643..... 38
Walker et al. v. Ellis et al.....	12 Ill. 470..... 19, 123, 131
Walter v. Dewey.....	16 Johns R. 222..... 229
Wallace v. Headley.....	23 Pa. St 106..... 13
Wallace v. Hall.....	22 Kan. 271..... 190
Wall v. Goodenough.....	16 Ill. 415..... 33, 110, 112
Warner v. Hale et al.....	65 Ill. 395..... 18
Wart. Cr. L., vol. 2, sec. 1083.....	63
Watson et al. v. Hooten Exr.....	4 Ill. App. 294..... 206
Watson v. Whitney.....	23 Cal. 375..... 151
Watson v. Hankins.....	13 Ia. 547..... 41
Watt v. Scofield.....	76 Ill. 261..... 242
Watts v. Coffin.....	11 Johns. 495..... 216
Wear v. Killeen.....	38 Ill. 259..... 155
Webster et al. v. Nichols et al.....	104 Ill. 160.....
	7, 34, 37, 45, 238, 242
Webb v. Hayman.....	40 Ill. App. 335..... 103
Weist v. The People.....	39 Ill. 507..... 154
Welford v. Beazley.....	3 Atk. 503..... 5
Wells v. Hogan.....	Breese, 337..... 142, 154, 160
Wells v. Reynolds.....	3 Scan. (Ill.) 191..... 191
Wells v. Mason et al.....	4 Scram. (Ill.) 84..... 21, 168
Werner v. Ropiequet.....	44 Ill. 522..... 235
Wescott v. Arbuckle et al.....	12 Bradw. 579..... 61, 104
Weston v. Haley.....	27 Vt. 283..... 139
West v. Frederick.....	62 Ill 191..... 83, 85
Wetsel v. Mayers et al.....	91 Ill. 497..... 238, 239, 242
Wheelen v. Fish.....	2 Bradw. 447.....
	92, 116, 165, 173, 179
Whiting v. Brastow.....	4 Pick. R. 310..... 226
Whitaker et al. v. Gautier.....	3 Gilm. 443..... 93, 100, 145
White v. Maynard.....	111 Mass. 250..... 28
Whitney v. Allaire.....	1 N. Y. R. 305 to 310..... 221
White v. Suttle.....	1 Swan (Tenn.), 169..... 141
Whittimore v. Gibbs.....	24 N. H. 484..... 17
Wilburn v. Haynes.....	53 Ill. 207..... 84
Wilcox v. Radden.....	7 Ill. App. 594..... 7

	PAGE
Wilkes v. Whitehead.....	89 Pa. St. 131..... 9
Wilder et al. v. House.....	48 Ill. 279..... 67, 72
Wildermann et al. v. Sandusky.....	15 Ill. 59..... 191
Willard v. Reinhardt.....	2 E. D. Smith, 148..... 27
Williams v. Newcomb.....	16 Mo. 185..... 186
Williams v. Vanderbilt.....	145 Ill. 138..... 37, 38, 126
Williamson v. Paxton.....	18 Gratt. (Va.) 475..... 84, 106
Willer v. French.....	27 Ill. App. 76..... 137, 188
Windett v. Horlbut.....	115 Ill. 403..... 156
Wineman et al. v. Hughson.....	44 Ill. App. 29..... 40
Witz v. Haynes.....	43 Ind. 470..... 141
Wolcott v. Sullivan.....	9 Paige (N. Y.), 117..... 204
Wolz v. Sanford.....	10 Ill. App. 136..... 7
Wood v. Tucker.....	66 Ill. 276..... 268
Woodward v. Blanchard.....	16 Ill. 424..... 162
Wood on Landlord and Tenant, 304.....	20, 27, 30, 32, 37
Woodward v. Cone.....	73 Ill. 241..... 32
Wright v. Lattin et al.....	38 Ill. 293.....
	24, 197, 201, 206, 217, 251, 254

## Y

Yoder v. Earley.....	2 Dana (Ky.) 245..... 107
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# LAW OF FORCIBLE ENTRY AND DETAINER.

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## CHAPTER I.

### THE LAW OF THE LEASE.

- SECTION
1. Definition.
  2. Written leases.
  3. Signature and seal.
  4. Implied leases.
  5. Parol leases.
  6. Parol agreement with the lease.
  7. Fraud in leases.
  8. What may be leased.
  9. Consideration.
  10. Agreement for a lease.
  11. Present demise.
  12. Time.

### KINDS OF TENANCY.

13. Tenancy at will.
14. Tenancy at sufferance.
15. Tenancy by the month.
16. Tenancy by the year.
17. Tenancy for life.
18. Covenants.
19. Express covenants.
20. Implied covenants.
21. Surrender of leases.
22. Rooms and lodgings.
23. Who are lodgers.
24. Who are tenants.
25. Lien on baggage for board.
26. Rights of lodgers.

27. Landlord defined.

#### FORFEITURE OF LEASES.

28. Nature of forfeitures.

29. Forfeitures at common law.

30. Under the statutes.

31. Waiver of forfeiture.

#### ATTORNMENT.

32. Definition.

33. Implied attornment.

§ 1. **Definition.**—The word “lease” has been derived from the Saxon word “leapum” or “leasum,” “for that the lessee cometh in by lawful means.” A lease is a contract for the possession and profits of lands and tenements, either for life or for a shorter term.<sup>1</sup> A better and clearer definition is a conveyance of any lands or tenements (usually in consideration of rent or other annual recompense) made for life, for years, or at will, but always for a less time than the lessor has in the premises.

The lessor is the person who grants the lease, and the lessee, the person to whom the lease is made.<sup>2</sup>

“To constitute a valid lease, it is not essential that the building which is the subject of the contract should be erected at the time the lease is made, or that the lessor should at that time be the owner of the ground upon which the building is to be placed.”<sup>3</sup>

A lease is a contract between landlord and tenant, fixing the terms of the tenancy. The Rev. Stat., chap. 80, sec. 13, says: “The term ‘lease,’ as used in this act,

<sup>1</sup> Bouv. Law Dic.

<sup>2</sup> Anderson Dictionary of Law, 606; 2 Bl. Com. 317.

<sup>3</sup> Haven & White v. Wakefield, et al., 39 Ill. 509.



shall include every letting, whether by verbal or written agreement." With many persons the word lease is used only to designate a written lease, but in law the contract of letting is the lease, whether written or verbal, and the written document is simply evidence of the contract.

§ 2. **Written leases.**—If a lease is in writing, it does not need to be under seal; nor does it need to be acknowledged or recorded to give it validity; and the lease can be made by the landlord or his agent, and it is not necessary that the agent should have other than verbal authority from his principal to authorize him to execute the lease without seal. But if the lease is made in writing under seal, in that case the agent must have authority under seal to act.

"An agent can execute a sealed instrument for and on behalf of his principal only when he has authority to do so in writing, under seal."<sup>1</sup> But as leases are not required to be sealed, an agent can make a valid lease on verbal authority only.

Written leases are frequently prepared in duplicate, one of which duplicates is executed by the lessor, the other by the lessee. In such case, both papers must be treated as a single instrument and must have the same legal effect as if each was signed by both parties at the same time.

In some states a lease is required to be under a seal the same as a deed; but in the State of Illinois a lease need not be under seal to be valid between the parties.<sup>2</sup>

<sup>1</sup> *Lake v. Campbell*, 18 Ill. 106; *Loach v. Farnum et al.*, 90 Ill. 368; *Beidler et al. v. Fish*, 14 Ill. App. 29.

<sup>2</sup> *Lake v. Campbell*, 18 Ill. 106.

§ 3. **Signature and seal.**—An instrument required to be sealed must have a scroll, the word “SEAL” or something for a seal; “WITNESS MY HAND AND SEAL” without a seal is not a sufficient sealing.<sup>1</sup>

The proper—not essential—words to constitute a lease are “demise, grant and to farm let.”

The date of a lease is not part of its substance, its real date being the time when it is delivered.

The names of the lessor and lessee in a formally worded lease, generally appear near to its commencement, after the date. Manifestly the document is incomplete unless their names appear somewhere in it; and, as just remarked, a lease under the statute must be subscribed by the lessor or his properly authorized agent.

Leases may be made by written contract or may be implied from acts and words of the parties.

It is essential to a complete written lease that the parties affix their signatures thereto, or such an act of recognition as would in law amount to a signature; until some such act or thing is done, it is not a lease.<sup>2</sup>

A signature to a lease may be made with a lead-pencil or in ink, or if the party so signing is in the habit of using a stamp with his name upon it as his signature, an impression of this made by him is sufficient.<sup>3</sup>

And it was held, that where a letter has been written by a party to a lease, to another party to it, referring to

<sup>1</sup> *Vance v. Funk*, 3 Ill. 263; *Doe v. McMahan*, 3 Scam. (Ill.) 12 (and note); *Eames v. Preston*, 20 Ill. 389.

<sup>2</sup> *Clemens v. Bloomfield*, 19 Mo. 118; *Wade v. Newbern*, 77 N. C. 460.

<sup>3</sup> *Snyder v. Norris*, 2 M. & S. 286; *Clason v. Bailey*, 14 Johns (N. Y.), 84.

it and acknowledging it as his contract, it was sufficient to bind such party.<sup>1</sup>

A lease by an infant lessor, himself, is voidable by him upon attaining majority, and the lessee, doubtless, in the meantime has no valid title to the possession. Acceptance of rent accruing after majority is a confirmation, and will render the lease binding. In the case of an infant lessee, continuance in possession of the premises after majority operates as a confirmation and binds him to the payment of the rent.

A receipt expressing the terms and nature of the tenancy may be a lease. For instance, the following was sustained as a lease :

“CHICAGO, Dec. 7, 1871.

“Received of M. F. Casey ten dollars (\$10.00) on rent of store on corner of Lake and Canal streets (No. 22), which Mr. Casey is to have for one hundred dollars (\$100.00) per month until May, 1873.”<sup>2</sup>

If a tenant signs a lease, retains one and makes, signs and seals a duplicate thereof and sends the same to the lessor, this in law will amount to an acceptance of the lease, notwithstanding the lessee may send with the duplicate a letter, stating that he does not assent to the terms of the lease as to the amount of rent he is to pay. Where his deliberate acts, under seal, evince an acceptance of the lease, his words cannot be received to a contrary intent.<sup>3</sup>

§ 4. **Implied leases.**—Where a lease recites that the

<sup>1</sup> Welford v. Beazley, 3 Atk. 503.

<sup>2</sup> Berrington v. Casey, 78 Ill. 317.

<sup>3</sup> Leiter v. Pike et al., 127 Ill. 287.

lessee is to pay a certain sum as rent for the premises, and he accepts the lease, which he may do by retaining the lease without objection, by going into possession under it or other similar act, this makes him a direct promissor to pay the rent, although he has not signed or executed the instrument.<sup>1</sup>

The acceptance of rent by a landlord from a tenant who is holding over after the termination of his tenancy, will amount to an election on part of the landlord to continue the tenancy on the same terms as before.<sup>2</sup>

Where the old lease expires, the tenant holds over and the landlord receives the rent, it is presumed, as a matter of law, that the old lease is renewed in all its terms.<sup>3</sup>

Where a tenant under a lease for a year or years holds over, it will be construed as an implied agreement that he shall hold for a corresponding period, upon the same terms, unless there be some act of one or both of the parties to rebut the implication.<sup>4</sup>

Six months prior to the end of the term, the landlord said to the tenant: "If you stay on, you will have the rent reasonable and I will throw off for heretofore." The tenant said nothing; nothing further was said and the tenant held over. As no notice was given and no new arrangement made, the tenant was held to occupy the premises as tenant from year to year and must pay the same rent as for previous years.<sup>5</sup>

Where a tenant occupies under a lease for one year and

<sup>1</sup> *McFarlane v. Williams*, 107 Ill. 33.

<sup>2</sup> *Goldsborough v. Gable*, 140 Ill. 269.

<sup>3</sup> *Miller v. Ridgely*, 19 Ill. App. 306.

<sup>4</sup> *Prickett v. Ritter*, 16 Ill. 96.

<sup>5</sup> *Holley et al. v. Metcalf*, 12 Ill. App. 141.

holds over without any new agreement, the landlord may elect to treat him as a tenant for another year, on the same terms.<sup>1</sup>

A tenant for years holding over after the expiration of his lease without any new arrangement with his landlord may be treated as a tenant for another year upon the terms of the original lease.<sup>2</sup>

If the assignee of a leasehold estate continues to occupy the premises after the term has expired, without any new agreement, the law will bind him to the same terms by which he was bound by the expired lease.<sup>3</sup> At common law "covenants" it is said, "ran with the land but not with the reversion. Therefore the assignee of the lessee was held to be liable in covenant and to be entitled to bring covenant, but the assignee of the lessor was not."

Where a tenant holds over after the expiration of his term, with the implied assent of the lessor, it will be upon an implied undertaking or liability to pay rent thereafter, on the same terms as in the original lease.<sup>4</sup>

Where a tenant took a lease of certain premises, which was canceled before the tenant came into possession thereof, but the tenant, being in possession under an old lease, remained a few days in occupancy of the premises, and, upon receiving notice from his landlord, that he would be considered as holding over under the prior lease, immediately vacated the premises, in such case there is no implied tenancy for another year.<sup>5</sup>

<sup>1</sup> *Quinlan v. Bonte*, 25 Ill. App. 240.

<sup>2</sup> *Wolz v. Sanford*, 10 Ill. App. 136.

<sup>3</sup> *Webster et al. v. Nichols et al.*, 104 Ill. 160.

<sup>4</sup> *Clapp et al. v. Noble*, 84 Ill. 62.

<sup>5</sup> *Wilcox v. Raddin*, 7 Ill. App. 594.

Where a tenant left certain property in the house and offered the same to the lessor in payment of rent due and the lessor took time to consider whether he would take the same, but gave no notice to the tenant that he would not accept it in payment for some considerable time, it was held that his silence implied assent and justified the jury in finding a payment of the rent.<sup>1</sup>

Where a tenant for a year or years holds over after the expiration of his lease, without making any new arrangement with his landlord, the landlord at his election may treat the tenant as a trespasser or as a tenant for another year, upon the same terms as in the original lease, and this though the tenant has no intention of holding over for a year or of paying the same rent. The law fixes the tenant's liability for holding over independent of his intention. The legal presumption of a renewal, from the holding over, can not be rebutted by proof of a contrary intention on the part of the tenant alone.<sup>2</sup>

§ 5. **Parol leases.**—A parol lease is where the parties agree either orally or by a writing not under seal.<sup>3</sup>

The taking of a new lease by parol is, by operation of law a surrender of the old one, although it be by deed, provided it be a good one and pass an interest, according to the contract and intentions of the parties.<sup>4</sup>

A lease of land by parol, for a term not exceeding one year, is valid.<sup>5</sup>

<sup>1</sup> *Dills v. Stobie et al.*, 81 Ill. 202.

<sup>2</sup> *Clinton Wire Cloth Co. v. Gardner et al.*, 99 Ill. 151.

<sup>3</sup> *Hallis v. Burns*, 100 Pa. St. 206.

<sup>4</sup> *Ryan v. Kirchberg*, 17 Ill. App. 132.

<sup>5</sup> *Bull v. Griswold*, 19 Ill. 631.

After a lease has been executed, the parol promises of the landlord to repair are void for want of consideration.<sup>1</sup>

A parol lease of premises for a year, to commence in future, is not an executory contract prior to the time of taking possession. It vests a present interest in the term and cannot be rescinded by either party alone. In case, therefore, of a refusal of the lessee to perform, the lessor is not required to lease to another if he has an opportunity and is not confined to his remedy for actual damages, but may refuse to accept a rescission and hold the lessee liable for rent.<sup>2</sup>

Although a lease may be void by the statute of frauds, if the tenant goes into possession thereunder and remains for a time, the lease may be looked to in determining the amount of rent due.<sup>3</sup>

A parol lease for one year is valid, and if the tenant under such a lease holds over for a portion of another year the lessor may elect to treat him as tenant from year to year and recover the value of the premises as upon a lease from year to year.<sup>4</sup>

A parol license by lessor to lessee to remain in possession after the expiration of the lease, made without consideration, is subject to revocation.<sup>5</sup>

A verbal agreement changing a contract under seal is valid if supported by a new consideration and not within the statute of frauds.<sup>6</sup>

<sup>1</sup> Libbey v. Tolford, 48 Me. 316.

<sup>2</sup> Becar v. Flues, 64 N. Y. 518.

<sup>3</sup> Evans v. Winona Lumber Co., 30 Minn. 515.

<sup>4</sup> Shepherd v. Cummings, 1 Coldw. (Tenn.) 354.

<sup>5</sup> Walker v. Wilson, 52 Ill. 352.

<sup>6</sup> Wilyes v. Whitehead, 89 Pa. St. 131.

A lessee who occupies premises, cannot avoid paying the rent agreed upon in a parol lease for five years, made by a married woman without her husband's concurrence. His liability for rent results from his occupancy, and the terms are properly regulated by a lease otherwise void.<sup>1</sup>

**§ 6. Parol agreement with the lease not binding.—**

A verbal agreement to give a lease is not binding if any essential matter affecting the rights of the parties—as here the time of commencement—is left open to future consideration and remains unsettled.<sup>2</sup>

The validity of an oral modification of an unsealed lease agreed to during the term of the lease, if acted upon by both parties appears yet plainer; as where a verbal arrangement being made that future rent under such a lease shall accrue at a reduced rate, the tenant continues his occupation and the landlord accepts an installment of rent at the reduced rate, giving a receipt as for rent in full.

A written lease under seal cannot be changed by a subsequent verbal agreement made during the existence of the lease;<sup>3</sup> but a new contract, for new consideration may be made in the same matter.

A parol lease “by the year” is for one year and binds the parties no longer.<sup>4</sup>

There may be a parol reservation of the landlord's share in growing wheat from a written lease, under which

<sup>1</sup> Nash v. Berkmeir, 83 Ind. 536.

<sup>2</sup> Sourwine v. Truscott, 17 Hun. (N. Y.), 432; Hallis v. Burns, 100 Pa. St. 206.

<sup>3</sup> Breher v. Reese, 17 Ill. App. 545.

<sup>4</sup> Pleasance v. Claghorn, 2 Miles (Pa.), 302.



the lessee takes possession before the maturity of the crop.<sup>1</sup>

Where the owner of certain lands enters into an agreement with another person by which the last named party is to raise a crop of wheat, corn and fodder upon the land, the owner to furnish all the teams, horses, etc., all seed, wheat and corn, and all the carts, etc., and some guano; the second party to do all the labor and cultivate and tend the crops, etc.; the owner to have a certain portion of the crop and the other person the residue; held, not to be parol lease.<sup>2</sup>

Where, since the amendatory acts of 1865 and 1867, relating to forcible entry and detainer, a landlord made a verbal lease of premises for two years and the said premises were occupied under the same and the rents paid, it was held that, although the contract was not binding on the parties in the first instance, because of the statute of frauds, yet, having been executed, no notice was necessary to terminate it, as in the case of a tenancy from year to year.<sup>3</sup>

If a lease in writing has been executed purporting to contain the whole contract between the parties, oral representations and understandings which the parties have failed to insert will not, as already seen, be added to the written contract, no fraud or other ground of equitable interference being shown. And an express covenant or agreement in such a lease on any particular subject will prevent the implication of a further or different covenant

<sup>1</sup> *Hisey v. Troutman*, 84 Ind. 115.

<sup>2</sup> *Currey v. Davis*, 1 *Houst. (Del.)*, 598.

<sup>3</sup> *Knecht v. Mitchell*, 67 Ill. 86.

or agreement on the same subject: "all implied covenants," it has been said, "are done away by express ones."

There are some engagements inferred or implied "from the use of certain words having a known legal operation."

Thus from the use in a lease of the word *demise* or the word *grant*, or the latin words *concessi* or *demisi*, the engagement is implied for the lessee's quiet enjoyment during the term, whether the lease be sealed or parol.

§ 7. **Fraud in leases.**—But if the lessee, by means of the willful wrong of the lessor, acquire by the lease no right to possession, he may recover as damages for the wrong, the difference in amount between the rent reserved and the annual value of the term, together with what expenses he has incurred in expectation of, and on the faith of the lease.

A lease not wholly ineffectual, but tainted by fraud of the lessor toward the lessee, such as false representation concerning the quantity of land comprised in the premises leased, may be rescinded by the lessee before taking possession, fraud being "a thing grievously amiss, and above all odious to the law."

The rule concerning representations is, that a person representing to be true, of his own knowledge, what false report has caused him to believe, is to be held to the same responsibility as one representing to be true what he knows to be false.

A parol agreement to vary a contract under seal cannot be pleaded in a court of law, to defeat a recovery on the original undertaking; and such an agreement will not discharge a security from liability.<sup>1</sup>

<sup>1</sup> Chapman v. McGrew, 20 Ill. 101.

It is not competent to modify or change the terms of a lease or other agreements under seal, by proof of a subsequent parol understanding or agreement.<sup>1</sup>

Where a landlord, at the request of the tenant, agrees to reduce the rent reserved in the lease, and there is no evidence tending to show the tenant had surrendered the premises or offered to do so and refused to execute the terms of the lease, or that there was any reason why he could then have surrendered the premises and refused to carry out the lease, such parol agreement to reduce the rent will be void for want of consideration and the landlord may collect the rent provided for in the written lease.<sup>2</sup>

Where the landlord agreed verbally, outside the lease, that the tenant should have the use of a well on another lot, and the tenant was deprived of the use by reason of the acts of the landlord, it was held that this could not amount to an eviction so as to defeat the collection of the rent, as the parol agreements were not named in the lease, but the tenant's right in respect to them grew out of a different contract.<sup>3</sup>

**§ 8. What may be leased.**—Anything corporeal or incorporeal, lying in livery or in grant may be subject of a lease for instance. lands, houses, commons, ways, fisheries, franchises, live-stock, goods, chattels, etc.<sup>4</sup>

**§ 9. Consideration.**—Some consideration must appear in order to make a lease valid, although this considera-

<sup>1</sup> B. & O. & C. R. R. Co. v. Ill. Cent. R. R. Co., 137 Ill. 9.

<sup>2</sup> Goldsborough v. Gable, 140 Ill. 269.

<sup>3</sup> Lynch v. Baldwin, 69 Ill. 210.

<sup>4</sup> Wallace v. Headley, 23 Pa. St. 106; Mickle v. Miles, 31 Pa. St. 20.

tion need not consist of what is technically called "rent," or a periodical rendering of compensation for the use of the premises; it may be a sum in gross or the natural affection which one party may have for another; it may consist of grain, animals or the personal services of the lessee; and the promise to pay rent to the owner of the premises is a sufficient consideration for an agreement to lease the premises to a person making such promise.<sup>1</sup>

Where one holds under a lease for monthly payments, an agreement to pay semi-monthly is a safe consideration for a new lease for less rent.<sup>2</sup>

§ 10. **Agreement for a lease.**—A clause in a lease for one year, giving the lessee the option, on a certain condition, to renew the lease for another year, is not a demise to take effect at the expiration of the first year; it is a mere covenant or undertaking of the lessor to let the lessee have a second term, which may be enforced on bill for specific performance, or upon which an action of law may lie for a breach.<sup>3</sup>

The privilege reserved in a lease, permitting the tenant, on notice, to extend the term for one or more years, is not a present demise, but a mere covenant, which may be enforced in chancery, or upon which an action of law may be maintained.<sup>4</sup>

A lease for one year, providing that the lessee may have the privilege of renewing the lease for five years, with the privilege to him of purchasing the premises,

<sup>1</sup> *McFarlane v. Williams*, 107 Ill. 33.

<sup>2</sup> *Goldsbrough v. Gable*, 36 Ill. Ap. 363.

<sup>3</sup> *Sutherland v. Goodnow et al.*, 108 Ill. 528.

<sup>4</sup> *Sexton v. Chicago Storage Co. et al.*, 129 Ill. 318.

etc., does not constitute a present demise of the premises for the extended time, which can be enforced in a court of law.<sup>1</sup>

§ 11. **Present demise.**—When the agreement in the lease is such that both parties are bound by the agreement that the lease should be actually executed, it constitutes a present demise; but where the tenant only is bound to take the premises and pay rent for the one year, it does not constitute a present demise for the extended term.<sup>2</sup>

Where a party in possession of premises under an unexpired lease, agreed with his landlord verbally that he should have the premises for another year, commencing at the expiration of the existing term, upon the same terms, a written lease to be executed, and a few days before the new term commenced the landlord withdrew his proposition and rescinded the verbal agreement, so that there was no time before such rescission that the lessee could have entered under the verbal agreement; held, that this was not a present leasing, but only an agreement for a lease.<sup>3</sup>

§ 12. **Time.**—When no date is fixed for the beginning of the tenancy, the time at which the tenant enters into the premises is to be regarded as the beginning of the tenancy.<sup>4</sup>

A lease for “the whole time that the lessee may be

<sup>1</sup> Hunter v. Silvers, 15 Ill. 174.

<sup>2</sup> Hunter v. Silvers, 15 Ill. 174; Tenney v. Child, 1 Maule & Selwin, 262.

<sup>3</sup> Griffin v. Knisely, 75 Ill. 411.

<sup>4</sup> Eberlein v. Abel, 10 Ill. App. 626.

postmaster," expired with the commission held by the tenant at the time the lease was made.<sup>1</sup>

A lease for "as long as wood grows or water runs" conveys a fee.<sup>2</sup>

### *Kinds of Tenancy.*

§ 13. **Tenancy at will.**—A tenancy at will is where one person lets land to another, to hold at the will of the lessor. A person who takes possession of premises under an agreement for a lease but refuses to carry out the agreement, is regarded as a tenant at will.<sup>3</sup>

Where parties move into the house without any terms or rent agreed on, they are mere tenants at will and a demand for possession will terminate the tenancy.

If a tenant be placed on the land without any terms prescribed or rent reserved, and as a mere occupier, he is strictly a tenant at will.<sup>4</sup>

Where a tenant is let into the possession of premises under an agreement to take a lease, which he afterwards refuses to do, he is a mere tenant at will after his refusal to make a lease.<sup>5</sup>

A verbal lease of land for a term of twenty years, at a rental of one dollar for the entire term, is a tenancy at will, a mere license and not assignable.<sup>6</sup>

A tenancy at will—at the common law, required no

<sup>1</sup> Easton v. Mitchell, 21 Ill. App. 189.

<sup>2</sup> Arms v. Burt, 1 Vt. 306.

<sup>3</sup> Herrell et al. v. Sizeland et al., 81 Ill. 457; Dunne v. Trustees of Schools, 39 Ill. 578.

<sup>4</sup> Herrell et al. v. Sizeland et al., 81 Ill. 457.

<sup>5</sup> Dunne v. Trustees of Schools, 39 Ill. 578.

<sup>6</sup> Packard v. C. C. C. & St. Louis R. R. Co., 46 Ill. App. 244.

notice to terminate it; but the statutory notice must generally be given to effect a termination of such tenancy.<sup>1</sup>

The interest of a tenant at will is not such an estate as can be assigned.<sup>2</sup>

And if an assignment is made, it terminates the tenancy.<sup>3</sup>

§ 14. **Tenancy at sufferance.**—A tenant at sufferance is one who comes into possession of land by lawful title but holds over by wrong after the determination of the interest. He has only a naked possession and has no estate which he can assign or transfer.<sup>4</sup>

A lessee holding over after the expiration of a tenancy at will is a tenant at sufferance.<sup>5</sup>

Where one buys a lot and permits another to occupy it, under no particular agreement as to time, the latter is a tenant at sufferance.<sup>6</sup>

A mortgagor, after a foreclosure and sale of the premises, is a tenant at sufferance.<sup>7</sup>

Tenants *per auter vie* after the death of the *cestui que vie*, tenants for years, whose terms have expired, tenants at will, whose estates have been determined by alienation or by the death of the lessor, under-tenants holding over after the expiration of the original lease and a lessee

<sup>1</sup> Prickett v. Ritter, 16. Ill. 96.

<sup>2</sup> Whittimore v. Gibbs, 24 N. H. 484.

<sup>3</sup> King v. Lawson, 98 Mass. 309.

<sup>4</sup> Proctor et al. v. Tows et al., 115 Ill. 138; Coomler v. Hefner, 86 Ind. 108.

<sup>5</sup> Cook v. Norton et al., 48 Ill. 20; Brown v. Smith, 83 Ill. 291.

<sup>6</sup> Proctor et al. v. Tows et al., 115 Ill. 138.

<sup>7</sup> Kinsley v. Ames, 2 Met (Mass.) 29; Mason v. Grey, 36 Vt. 308.

who agrees to deliver possession by a particular day and holds over, are tenants at sufferance.<sup>1</sup>

A tenant at sufferance at the common law is not liable for rent, nor entitled to emblements.<sup>2</sup>

Under a tenancy at sufferance, the landlord can terminate the relation at his pleasure.<sup>3</sup>

**§ 15. Tenancy by the month.**—Where a party enters into possession of premises under a verbal letting, which is void under the Statute of Frauds, agreeing to pay rents monthly, and pays rent under the contract a while, he will become a tenant from month to month and as such is entitled to notice to quit.

A letting by parol for a certain sum per month, nothing being said about a year, constitutes a lease from month to month, and the fact that the tenant holds over for more than a year can not make him a tenant from year to year.

Where a party enters possession of premises under a verbal letting, which is voidable under the Statute of Frauds, agreeing to pay rent monthly, which he pays as it accrues, he becomes a tenant from month to month.<sup>4</sup>

A person in possession of real estate under a written agreement for a lease for a longer term than one year, occupies under a verbal leasing within a statute of frauds, and his tenancy is one from month to month.<sup>5</sup>

<sup>1</sup> *Brown v. Smith*, 83 Ill. 291.

<sup>2</sup> *Flood v. Flood*, 1 Allen (Mass.), 217.

<sup>3</sup> *Dixon v. Haley*, 16 Ill. 145; *Emmons v. Scutter*, 115 Mass. 367; *Mason v. Grey*, 36 Vt. 308; *Warner v. Hale et al.*, 65 Ill. 395.

<sup>4</sup> *Brownell et al. v. Welch*, 91 Ill. 523.

<sup>5</sup> *Blake v. Kurrus*, 41 Ill. App. 562.



§ 16. **Tenancy from year to year.**—The reservation of an annual rent is the leading circumstance that turns leases for uncertain terms into leases from year to year.<sup>1</sup>

Where a contract for a lease provides that the rent is to be paid annually, but 'fixes' no time of payment, and no contrary usage is shown, the rent will be payable at the end of the year.<sup>2</sup>

Where a person holds lands or tenements under a demise from another, under an agreement to pay an annual rent, without any other provision as to the length of the term, it constitutes a tenancy from year to year; in other words, a tenancy from year to year is a general letting, without any limitation as to time.<sup>3</sup>

According to the rule as held in England and many of the United States, a tenancy from year to year would continue until one party should notify the other six months previous to the end of the year of an intention to determine it.<sup>4</sup> But under the Illinois statute, sixty days notice prior to the end of the term will terminate a yearly tenancy.

A tenant occupying premises under a written lease and holding over will be compelled to pay the same rent that the lease provided for: if it is an annual lease, and the rent to be paid monthly, the premises cannot be abandoned and the rent avoided, except at the end of the year.<sup>5</sup>

<sup>1</sup> *Herrell et al. v. Sizeland et al.*, 81 Ill. 457.

<sup>2</sup> *McFarlane v. Williams*, 107 Ill. 33.

<sup>3</sup> *Gartside et al. v. Outley et al.*, 58 Ill. 210; *Hunt v. Morton*, 18 Ill. 75.

<sup>4</sup> *Walker et al. v. Ellis et al.*, 12 Ill. 470.

<sup>5</sup> *McKinney v. Peck*, 28 Ill. 174.

Where a tenant went into possession of land without any specific contract for the payment of rent, with permission to remain until spring, and continued in possession, raising crops for two years, it was held to be a tenancy from year to year and that a proceeding for forcible detainer, without notice to terminate the tenancy, could not be sustained.<sup>1</sup>

§ 17. **Tenancy for life.**—A lease for life, being a freehold, can be created by instrument under seal, only, but a lease of land for years by an individual, might at common law, be made by mere words, no particular form of expression being necessary, if words sufficiently declaring the intention of the lessor were spoken.

§ 18. **Covenants.**—A covenant in a lease is a stipulation that a certain thing has or has not been or shall or shall not be done; or it may be properly said to be an agreement of the parties under seal.<sup>2</sup>

Each covenant in a lease belongs only to the party who is to perform it, and it must be taken as his language; but a covenant in a lease may be a covenant of both parties.<sup>3</sup>

A party has no right to recover under any contract until he has performed his part of the agreement, and this is true in any form of action *ex contractu* and the jury alone are the judges as to whether or not the conditions had been performed.<sup>4</sup>

§ 19. **Express covenants in leases.**—The words

<sup>1</sup> Hunt v. Morton, 18 Ill. 75; Wood Landlord & Tenant, 304.

<sup>2</sup> Randall v. Lynch, 2 East. 182.

<sup>3</sup> Olcott v. Dunklee, 16 Vt. 478.

<sup>4</sup> Harnus et al. v. McCormick et al., 132 Ill. 104.

“demise” or “demised” in a lease import a covenant on part of the lessor of good right and title to make the lease and also imply a covenant for quiet enjoyment.<sup>1</sup>

The word “demise” in a lease imports a legal estate in the lessor; if the tenant be ejected from the demised premises by force of an adverse title and entry, he will be discharged from the payment of rent.<sup>2</sup>

This agreement for quiet enjoyment, which in every valid lease for a definite term of years, is implied, if not expressed, is interpreted as assuring to the lessee legal entry, as well as enjoyment after entry.

If when the lessee at or after the time fixed for the commencement of the term, attempts to enter under the lease, some person, not claiming by an adverse title, be in possession, the agreement is not thus broken, since the legal entry is not prevented, and the lessee may, by virtue of his lease, proceed against the intruder to obtain possession.

A lease of property on a monthly rental of \$500 a year provided that on the determination thereof, by lapse of time or otherwise, the lessee should yield up immediate possession of the premises to the lessor, and in case of failure to do so, the lessee should pay liquidated damages for the whole time such possession should be withheld, the sum of \$30 per day. The lessee held over 105 days, and the proof showed that the rental value of the premises was \$7,000 a year. Held, that the lessor was entitled to recover and collect from the lessee the sum fixed in the lease as liquidated damages.

<sup>1</sup> Adlard v. Muldoon, 45 Ill. 193.

<sup>2</sup> Wells v. Mason et al., 4 Scam. (Ill.) 84.

The fact that negotiations for a lease of demised premises are pending under an agreement to extend the term of the original lease, which negotiations failed and were abandoned, will not justify the tenant in holding over so as to relieve him from his covenant in the lease, to yield up to the landlord the possession of the premises at the end of the year. And this is so, even though the original lessor may have received a check for the first month's rent, pending such negotiations, which check was returned to the maker on the failure of the parties to agree upon the new lease.<sup>1</sup>

A landlord gave a tenant a lease in which were these words, "tenant to have privilege of storing a reasonable number of cases in the basement." This was held to be, not a leasing of the premises, but the grant of a privilege to the lessee to occupy for a special purpose.<sup>2</sup>

The covenant arising from a "demise" of premises, whether express or implied, only means that the lessor shall have such title to the premises as will enable him to have a good and unincumbered lease for the term demised. It implies no warranty against the acts of strangers. It confers upon the lessee a right to enter upon the premises, but nothing more.<sup>3</sup>

§ 20. **Implied covenants.**—The implied covenant for quiet enjoyment creates no obligation on the part of the lessor to place the lessee in possession of the premises.

<sup>1</sup> Poppers v. Meagher, 148 Ill. 192; Bryton v. Marston, 33 Ill. App. 211; Tiernan v. Hinman, 16 Ill. 400.

<sup>2</sup> Chiett et al. v. Sheppard, 131 Ill. 636.

<sup>3</sup> Gardner v. Keteler, 3 Hill, 330; Cozens v. Stevenson, 5 S. & R. 424; Pendergast v. Young, 1 Foster, 233; Gazzolo v. Chambers et al., 73 Ill. 75.

If he is kept out of possession by any act of the landlord or by one holding paramount title, the lessee has a right of action. The amount of damage in such case is the difference between the rental and the actual value of the premises to the lessee.<sup>1</sup>

The law will imply covenants for quiet possession and enjoyment against paramount title and against such acts of the landlord as destroy the beneficial enjoyment of the lease.<sup>2</sup>

There is an implied covenant on part of the tenant, that he should commit no voluntary waste or nuisances injurious to the premises and that farming land shall be cultivated in a husband-like manner and not in a manner materially different from its former use.<sup>3</sup>

The parties to a lease may provide therein, that the lessee waives his right to notice of an election to declare the term ended, or for any demand for the payment of rent, or for demand for the possession of the premises, and provide that the simple fact of the non-payment of rent shall constitute a forcible detainer. Such an agreement is binding on the lessee, so that the action will lie upon the simple proof of the non-payment of rent reserved.<sup>4</sup>

The lessee cannot have his lease set aside and be released from his covenants to pay rent, from the mere fact that a prior tenant, whose term has expired, holds over without right.

<sup>1</sup> *Gazzolo v. Chambers et al.*, 73 Ill. 75.

<sup>2</sup> *Wade v. Halligan*, 16 Ill. 507; *Berrington v. Casey*, 78 Ill. 317.

<sup>3</sup> *Walker et al. v. Tucker et al.*, 70 Ill. 527; *Hughes v. Van Stone* 24 Mo. App. 637; *Nave v. Benney*, 22 Ala. 382.

<sup>4</sup> *Espen et al. v. Hinchliffe*, 131 Ill. 468.

The lessee, having the right of possession, should take legal steps to obtain the possession from such prior tenant.<sup>1</sup>

§ 21. **Surrender of leases.**—The tenant cannot surrender premises leased to him before the expiration of the term, so as to absolve himself from the payment of rent thereafter, without the consent of the lessor; and the abandonment of the premises, with notice thereof to the lessor, will not exonerate the lessee thereafter from his obligation to pay rent, unless the lessor assents thereto.<sup>2</sup>

Any act of the landlord which renders the lease unavailable to the tenant, discharges such tenant from the terms and conditions of the lease, and he may abandon it.<sup>3</sup>

Where a tenant surrenders his lease in view of a contemplated sale of his improvements, to enable the lessor to make a new lease to the purchaser, the original lease, in law, if not in equity, is canceled and the lessor invested with the legal title to the term, and, without any new writing to restore the term, the lessor may again lease and pass the legal title free from the claim of the first lessee.<sup>4</sup>

The surrender of a lease cannot be effected by the act of one party only; the concurrence of both is necessary.<sup>5</sup>

Where a written lease contains the stipulation that the tenant may, after the expiration of the term, continue to

<sup>1</sup> Field et al. v. Herrick et al., 101 Ill. 110.

<sup>2</sup> Stobie et al. v. Dills, 62 Ill. 432.

<sup>3</sup> Wright v. Lattin et al., 38 Ill. 293.

<sup>4</sup> Stewart et al. v. Munford, 91 Ill. 58.

<sup>5</sup> Lewis et al v. Fish, 40 Ill. App. 372.

occupy by the month, but does not bind himself to do so, each party, in that case has an equal right after the expiration of the term to put an end to the tenancy by the month by giving the proper notice.<sup>1</sup>

Where a tenant had a written lease, providing that "he should have the privilege of a further lease of five years after the expiration of his term," the five years elapsed and the tenant elected to renew. An action of forcible entry and detainer was brought to oust him. It was held, that under the statute amended, appellees had a right to defend under the covenants in the lease, paying all installments of rent as they became due, the covenant for a lease being equivalent to a lease written out in full form.<sup>2</sup>

§ 22. **Rooms and lodgings.**—There is another species of tenancy, called lodgings, which occurs when only part of a tenement is let to another; and this usually consists of furnished apartments. Being a contract for an interest in lands, it is within the statute of frauds, and must, therefore, be in writing, in all cases where the statute requires a lease to be in writing. Thus, where the plaintiff took a house, partly furnished, at a certain rent, and the defendant agreed to send in all other necessary furniture within a reasonable time, it was held that the defendant's agreement to send in the furniture was an inseparable part of a contract for an interest in land, and ought, therefore, to be in writing.

But a contract with a keeper of a hotel, or boarding

<sup>1</sup> *McDevitt v. Lambert*, 80 Ala. 536.

<sup>2</sup> *Eichhorn v. Peterson et al.* 16 Ill. App. 601.

house, for board and lodging, paying separate prices for each, whether it be by the week, month, or year, creates no relation of landlord and tenant between the parties; for the lodger acquires no interest in the real estate, the contract being entire for board and lodging.

“ Lodgers are entitled to all the privileges of tenants, and if a man take lodgings on the first or second floors of a house, he has a right to the use of the door-bell, the knocker, the sky-light of the staircase, and the water-closet, unless it is otherwise stipulated at the time of taking the lodgings; and if a landlord deprives a lodger of the use of either, an action lies. He is also, in general, subject to the same liabilities as other tenants; and is not justified in quitting his apartments without proper notice, even from fear, however reasonable, that his goods may be seized for his landlord's rent. If a house is divided into several apartments with an outer door to each apartment, and no communication with each other subsists, the several apartments are, for certain purposes, considered in law as distinct mansion houses; but if the owner lives in the house, all the untenanted apartments will be considered as parts of his house. In general, however, the question, what shall be deemed the mansion house of the party, turns upon the fact of their being an outer door or not. Thus, chambers in inns of court and in cottages, which have each of them an outer door that opens upon the common staircase, have been held, in cases of burglary, to be the houses of the respective occupants. But this privilege extends only to the purposes of protection for a man and his family; a bailiff,



therefore, in the execution of mesne process, may break open the door of a lodger, having first gained peaceable entrance at the outer door of the house."<sup>1</sup>

A person who agrees to take furnished lodgings, but does not enter, is not liable to an action for use and occupation.<sup>2</sup>

Letting lodgings is not a breach of a covenant not to under-let.<sup>3</sup>

A verbal agreement to take ready furnished lodgings "for two or three years" is a contract for an interest in land within the meaning of the statute of frauds, and is not valid unless in writing.<sup>4</sup>

The distinction between a boarding-house and an inn is, that in the former, the guest is under an express contract for a certain time at a certain rate; in the latter, the guest is entertained from day to day upon an implied contract.<sup>5</sup>

Assuming it to be a usage in lodging-houses, that the keeper, when the lodger is about to quit his apartments, has license to enter and show them to strangers who are inquiring for lodgings, there does not arise out of that usage, any liability on the keeper, if goods are then stolen, for not using due and proper care to prevent such persons from carrying away the lodger's goods then in the apartments.<sup>6</sup>

<sup>1</sup>Taylor's Landlord and Tenant, Secs. 66 and 67.

<sup>2</sup>Edge v. Stafford, 1 Tyr. 293; Edge v. Stafford, 1 Crompton and Jervis, 391.

<sup>3</sup>Pitt v. Laming, 4 Camp. 77; Reichenbacher v. Palmeyer, 8 Bradw. 217; Greene v. Hague, 10 Bradw. 598; Wood's Landlord and Tenant, Sec. 539.

<sup>4</sup>Ely v. Ely, 80 Ill. 532.

<sup>5</sup>Willard v. Reinhardt, 2 E. D. Smith, 148.

<sup>6</sup>Willard v. Reinhardt, 2 E. D. Smith, 148.

§ 23. **Who are lodgers.**—A lodger is one who inhabits a portion of a house of which another has the general possession and custody.<sup>1</sup>

The distinction between a lodger and tenant seems to be, in a keeper reserving to himself the legal possession, custody and care of the whole house.<sup>2</sup>

It is not easy to give a general definition of the word “lodger,” but it involves more than the word “tenant;” there is a personal relation. A lodger lodges with somebody who has control over the house. The question whether a person is a lodger, or not, depends partly on the contract between him and his landlord and partly on the fact that the landlord retains control over the house. The lodger has no interest in the real estate except such as is necessary for the enjoyment of the apartments rented; he enters into the contract with the keeper of the house, who retains control over it. Should a lodger, however, lease apartments in a house and take full possession and control of the apartments leased, the relation of landlord and tenant would at once be established.<sup>3</sup>

§ 24. **Who are tenants.**—When the owner of a house takes a person to reside in part of it, though such person has exclusive possession of the rooms appropriated to him and the uncontrolled right of ingress and egress; yet, if the owner retains his character of master of the house, the individual, though occupying part of it, occupies it as a

<sup>1</sup> Bouv. Law Dict.

<sup>2</sup> *White v. Maynard*, 111 Mass. 250; *Cochrane v. Tuttle*, 75 Ill. 361.

<sup>3</sup> *McMillan v. Solomon*, 42 Ala. 356; *Richardson v. Richardson*, 75 Mass. 213.

lodger only and not as a tenant. The fact of the party having or not having the key to the outer door is not decisive of the question; but the question depends upon whether or not the owner of the house resides on the premises, retaining his quality of master and reserving to himself the general control and dominion of the whole. If he does, the inmate is a mere lodger; that is the fundamental proposition, that the landlord must reserve control and dominion over the house. If the owner gives up his house to another person to live in, the occupant is a tenant. Therefore, if you go out and give up the house to him, he is a tenant and not a lodger.<sup>1</sup>

§ 25. **Lien on baggage for board.**—The statute of Illinois, chap. 82, sec. 48, provides as follows: "Hotel, inn and boarding-house keepers shall have a lien upon the baggage and other valuables of their guests or boarders brought into such hotel, inn or boarding-house, by such guests or boarders, for the proper charges due from such such guests or boarders for their accommodations, board and lodgings, and such extras as are furnished at their request."

If a lessee of rooms, before the expiration of the term, abandons the premises, delivers the key to the landlord's agent, and notifies the landlord of the fact by letter, and he, in reply to the letter, makes no objection and retains the key, this will be sufficient evidence to authorize a jury in finding a termination of the tenancy.<sup>2</sup>

§ 26. **Rights of lodgers.**—It is incumbent on a boarding-house keeper to exercise due and proper care

<sup>1</sup> Thome v. Luckett, 5 C. B. 38.

<sup>2</sup> Dills v. Stobie et al., 81 Ill. 202.

of the baggage or property of his boarder—such care as a prudent person would take of his own property; and he is liable for the loss of his guest's goods, occasioned through the negligence of his own servants, while they are acting within the scope of their employment.<sup>1</sup>

There is no duty on a keeper of a lodging-house to take care of his lodger's goods, as in the case of an inn-keeper.<sup>2</sup>

It is said there is an implied condition in the letting of a furnished house, that it shall be reasonably fit for habitation.<sup>3</sup>

This is an exception to the general rule that there is no implied warranty on the letting of an house or land that it shall be reasonably fit for habitation or cultivation, or any other purpose for which it was let.<sup>4</sup>

Where a tenant enters into possession of a furnished house or apartments, he may be compelled to pay the rent in an action for use and occupation, and his goods may be distrained by the landlord.

There is no presumption from a general hiring of lodgings and furnished apartments, that it is a hiring for a year, as in the case of the hiring of unfurnished houses or of lands.

If the rent is payable weekly, monthly or quarterly, it will be a weekly, monthly or quarterly tenancy accordingly.

<sup>1</sup>Smith v. Reed, 52 How. (N. Y.) Pr. 14.

<sup>2</sup>Holder v. Soulby, 6 Jur. (N. S.) 1031; 29 L. J., C. P. 246; 8 W. R. 438; C. B., N. S. 254; Wood's Landlord and Tenant, §§ 51, 53.

<sup>3</sup>Smith v. Marrable, 11 M. & W. 5; Wood's Landlord and Tenant, § 51; Taylor's Landlord and Tenant, § 381, and note.

<sup>4</sup>Wood's Landlord and Tenant, § 53.

When the landlord retains general possession, lodgers are only responsible for willful injuries to the property, or such as resulted from their negligence.<sup>1</sup>

To create the relation of landlord and tenant, there must have been a transfer of the possession of land itself, or of some part of a building erected upon the land, such possession not being subject to the control or interference of the lessor, unless certain privileges be specially reserved to him, this relation does not exist between the keeper of an hotel, inn or boarding-house and his guests, lodgers or boarders. These are inmates, not tenants.<sup>2</sup>

§ 27. **Landlord defined.**—"The word 'landlord' does not mean the lord of the soil, but the person between whom and the tenant the relation of landlord and tenant exists." The term "landlord" extends, it seems, to every person whose title is connected with and consistent with the possession of the occupier.<sup>3</sup>

### *Forfeiture of Leases.*

§ 28. **Nature of forfeitures.**—Forfeitures are not regarded with any special favor by the courts, and where a party insists on a forfeiture, he must make clear proof and show that he is entitled to it. It is a harsh way to terminate contracts, and he who insists on making a declaration of forfeiture must be held strictly within the limits of the authority which gives the right. And where the landlord reserved the right to declare a forfeiture of the lease for default in the payment of rent,

<sup>1</sup> Taylor's Landlord and Tenant, § 381.

<sup>2</sup> Birdsall v. Phillips, 17 Wend. R. 464, 472; see Baxter v. West, 5 Daly, R. 460.

<sup>3</sup> Churchward v. Ford, 2 H. & N. R. 445, 450.

and several installments were unpaid, and the landlord had evinced a disposition to favor the tenant, and the tenant relied on this, it was held that, under the circumstances, even though in the lease, the tenant had waived the right to any notice, of an intention of the lessor to declare a forfeiture, yet the tenant should have notice before such declaration could properly be made.<sup>1</sup>

As forfeitures are odious to the law, such forfeitures are never enforced but upon strict compliance with all the requirements of the law. All leases having such conditions would be attended with the same consequences, and be liable to be swept away if the rent is not paid on the day it falls due, notwithstanding it may owe its entire value to the expenditure of labor and money of the tenant. It is only reasonable that the landlord should, on the day his rent falls due, indicate his intention to terminate the lease, and the tenant have the entire day within which to make payment. When the five days given by the statute expire after notice and demand, without payment of rent in arrear, the tenancy is terminated, and the landlord may sue and recover possession.<sup>2</sup>

To create a forfeiture under the act of 1865, for non-payment of rent, there must be a demand of the rent and ten days' notice to quit, and a failure to pay the rent before the expiration of the ten days; and the action of forcible entry and detainer will not lie until all these things take place.<sup>3</sup>

<sup>1</sup> Palmer v. Ford, 70 Ill. 369; Wood's Landlord and Tenant, Sec. 518.

<sup>2</sup> Chadwick v. Parker, 44 Ill. 326; Chapman et al. v. Kirby, 49 Ill. 211; Wood's Landlord and Tenant, Secs. 518, 519.

<sup>3</sup> Woodward v. Cone, 73 Ill. 241.

The possession of a tenant is that of the landlord, in fact and in law; and the claiming of adverse possession by the tenant or those claiming under him forfeits the term and the landlord may enter or bring forcible detainer; otherwise, if the descent is cast by death of the disseisor.<sup>1</sup>

Where the lessee of premises has sub-let a portion of the same and afterwards forfeits his own lease by non-payment of rent and is evicted, an action of forcible detainer will lie by the landlord against the sub-tenant to recover possession of the portion of the premises held by him, nor would it change or affect the relations of the parties if the landlord had consented to the sub-letting.<sup>2</sup>

In cases of forfeiture of a lease for non-payment of rent, there must be a demand at a fixed time, or the forfeiture will not accrue.<sup>3</sup>

§ 29. **Forfeiture at common law.**—At common law, in order to justify the landlord in declaring a forfeiture of the lease for the non-payment of rent, a demand of the rent was necessary on the day it became due; but the statute of this state has changed the rule, and a demand may be made any time thereafter.<sup>4</sup>

In an action of forcible detainer for failure to pay rent, if the plaint does not aver that a demand for the rent was made, it is insufficient to support a judgment of forfeiture.<sup>5</sup>

The second section of the chapter of the revised stat-

<sup>1</sup> Wall v. Goodenough, 16 Ill. 415.

<sup>2</sup> Patchell et al. v. Johnston, 64 Ill. 305.

<sup>3</sup> Chapman v. Wright, 20 Ill. 120.

<sup>4</sup> Burt v. French, 70 Ill. 254.

<sup>5</sup> Cone v. Woodward, 65 Ill. 477.

utes, entitled "Landlord and Tenant," gives the landlord double rent in case of a willful holding over after the term has expired, by afflux of time, and not to a case of holding over, where the term is ended by act of the landlord in declaring a forfeiture. In the latter case, the tenant is liable to no more than a fair and reasonable rent for the use and occupation for the time he holds over.<sup>1</sup>

And the covenant being made for the benefit of the lessor only, it is held, that an assignment made without consent is not void, but merely voidable, and that such sub-letting or assignment contrary to the terms of the lease does not work a forfeiture without the lessor declaring to that effect.<sup>2</sup>

It is held, that the evidence fails to establish a forfeiture of the lease,—where the tenant continued on the place under the lease and precisely as he did previously, until the following January. Although a forfeiture may have been spoken of, we find none of the steps taken by the landlord that are usually employed to manifest such an intention. The record of the proceeding was not produced and the evidence fails to show that there was any service on or appearance by the defendant.<sup>3</sup>

In giving construction to the act of 1865, this court has said, that if the tenant pays the rent in arrears within the ten days after service of the notice, a forfeiture of the lease is thereby prevented.<sup>4</sup> This was in a

<sup>1</sup> *Stuart v. Hamilton*, 66 Ill. 253.

<sup>2</sup> *Webster et al. v. Nichols et al.*, 104 Ill. 160; *Eldredge v. Bell*, 64 Ia. 125.

<sup>3</sup> *Cheney v. Bonnell*, 58 Ill. 268.

<sup>4</sup> *Chapman v. Kirby*, 49 Ill. 211.



case where a notice had been given to terminate the tenancy because the rent had not been paid.

§ 30. **Under the statutes.**—To create a forfeiture, so as to support the action of forcible entry and detainer for the non-payment of rent, under the act of 1865 four things must concur: there must be a default in the payment of rent; a demand of the same; a ten days' notice to quit; and a failure to pay the rent before the expiration of the ten days' notice.<sup>1</sup>

A forfeiture of a lease will not be inferred, because there were grounds for declaring a forfeiture, but all the requisite steps must be taken. A forfeiture cannot be produced unless there is a notice that the tenancy has ended, a demand for possession and a notice to quit. The law does not favor such forfeitures.<sup>2</sup>

Mere non-payment of rent does not authorize the landlord to enter upon and forcibly expel the tenant, or to remove the tenements or any appurtenances thereto, nor to cut off steam power agreed to be supplied to the tenant by the landlord in the lease.<sup>3</sup>

Rent collected after re-entry inures to the benefit of the tenant. A provision in a lease against a forfeiture of the rents to be paid during the fall term, does not authorize the lessor to collect the subsequent rent, both from the lessee named in the lease and also from the tenant to whom the lessor may re-let the premises, but the rent due from the original lessee is to be credited with such rent as is realized from the re-letting. The

<sup>1</sup> Cone v. Woodward, 65 Ill. 477.

<sup>2</sup> Cheney v. Bonnell, 58 Ill. 268.

<sup>3</sup> Chapman et al. v. Kirby, 49 Ill. 211.

lessor is entitled to such sum as is equal to the rents required by the tenure of the lease to be paid during the full term, and no greater sum.

If the liability of the lessee for rent accruing after re-entry by the lessor may be inferred from a provision in the lease authorizing the lessee to re-let for the benefit of the lessor, there can be no doubt about the liability of the lessee for such subsequent rent under an express stipulation that the re-entry shall not work a forfeiture thereof.<sup>1</sup>

Provisions for forfeiture are not favored by the law. While no precise form of words is requisite to their creation the intention that a liability to forfeiture shall be incurred must be unmistakable.

It is said that "in all cases where an estate for years is granted on condition, and the lease declares that the estate shall cease and determine on the breach of the condition, without any clause of re-entry or other qualification, the estate will *ipso facto* cease as soon as the condition is broken." But whenever a lease provides that on breach of any condition the lessor shall or may re-enter and perhaps, generally in instances where the provision for forfeiture relates to breach of a duty, which, under his lease, the lessee owes to the lessor, the estate, on a breach, is held to be void as to the lessee, but as to the lessor voidable only, and the forfeiture is to be enforced, if the landlord elect to enforce it at all, by an action of ejectment.<sup>2</sup>

§ 31. **Waiver of forfeiture.**—If the landlord, know-

<sup>1</sup> Grommes et al. v. St. Paul Trust Co. et al., 147 Ill. 634.

<sup>2</sup> Clark v. Jones, 1 Denio R. 516.

ing the cause of forfeiture by his tenant, recognizes the sub-lessee as his tenant, or receives rent subsequently accruing, he thereby waives the forfeiture.<sup>1</sup>

The general rule is, that any act done by a landlord knowing of a cause of forfeiture by his tenant, affirming the existence of the lease and recognizing the lessee as his tenant, is a waiver of the forfeiture.<sup>2</sup>

The acceptance by a landlord, after his right of possession was fixed, of property from the tenant in payment of rent that had accrued, is no waiver of his right to enter.<sup>3</sup>

Lessor having declared forfeited for non-payment of rent, a lease given to three lessees, the fact that one is willing to give up the lease does not render the transaction a voluntary surrender.

Delay of 23 days in declaring a lease forfeited for non-payment of rent does not constitute a waiver of the right of forfeiture.<sup>4</sup>

An action for subsequent rent, with knowledge that a forfeiture has been incurred by the breach of some covenant or condition, operates as a waiver of the forfeiture.<sup>5</sup>

The acceptance of an obligation of inferior or of an equal degree does not extinguish a prior obligation, unless such is the express agreement of the parties, and rent issuing out of the realty is of a higher obligation than any simple contract. The execution of a prom-

<sup>1</sup> Webster et al. v. Nichols et al., 104 Ill. 160.

<sup>2</sup> Williams v. Vanderbilt, 145 Ill. 238.

<sup>3</sup> Frazier et al. v. Caruthers et al., 44 Ill. App. 61.

<sup>4</sup> Williams v. Vanderbilt, 34 N. E. Rep. 476.

<sup>5</sup> Wood's Landlord and Tenant, Sec. 518.

issory note for rent due does not operate as a waiver of the right to enforce payment by distress.<sup>1</sup>

The common law rule, making it necessary to demand the rent on the day it falls due in order to declare a forfeiture, is abrogated in this State. The landlord may forfeit the lease for non-payment of rent on any day after the rent falls due.<sup>2</sup>

The tender of a certificate of deposit of fifty dollars in payment of forty-seven dollars and seventy cents of rent due, if not objected to at the time on some proper ground, will be sufficient to prevent the lessor from declaring a forfeiture of the term for the non-payment of rent.

*Attornment.*

§ 32. **Definition.**—Any act of the tenant which recognizes a change of the person to whom he pays the rent is an attornment.<sup>3</sup>

Payment of rent is a sufficient attornment.<sup>4</sup>

Where a landlord had leased premises and before the expiration of the term sold to a third party, and the tenant had paid one or more installments of rent to the grantee, it was held, that such a payment amounted to an attornment and authorized the grantee to sue for the recovery of the rent.<sup>5</sup>

A purchaser at a foreclosure sale cannot distrain for

<sup>1</sup> *Atkins v. Byrnes*, 71 Ill. 326.

<sup>2</sup> *Williams v. Vanderbilt*, 145 Ill. 238.

<sup>3</sup> *Oswald v. Mollet*, 29 Ill. App. 449.

<sup>4</sup> *Walker v. McDonald*, 28 Ill. App. 643.

<sup>5</sup> *Fisher v. Deering*, 60 Ill. 114.

rent against a tenant holding under grantors of the equity of redemption unless the tenant attorns to him.<sup>1</sup>

If a tenant should attorn to another and is turned out of possession by forcible detainer by the person to whom he attorns, the first lessor can maintain the same action against the second lessee. The latter, in such case, can occupy no better position than the tenant under the first lease.<sup>2</sup>

§ 33. **Implied attornment.**—Where a tenant, after notice of a conveyance of the demised premises by his landlord, promises to pay rent to the grantee, this is sufficient evidence of an attornment.<sup>3</sup>

A tenant has a right to attorn to one who has acquired his landlord's title, but not to one who has acquired a title hostile to the landlord, although it may be a better title.<sup>4</sup>

Attornment is an acknowledgment by the tenant of a new landlord after the transfer of the premises and his agreement to become the tenant of the new landlord.<sup>5</sup>

A tenant who has received possession from his landlord has no right to attorn to a third person without first surrendering possession to his landlord or obtaining his consent to such attornment.<sup>6</sup>

<sup>1</sup> Reed v. Bartlett, 9 Ill. 267.

<sup>2</sup> Cox v. Cunningham, 77 Ill. 545.

<sup>3</sup> Hayes v. Lawyer, 83 Ill. 182.

<sup>4</sup> Bailey v. Moore et al., 21 Ill. 165.

<sup>5</sup> Lindley v. Dakin, 13 Ind. 388; Austin v. Ahearn, 61 N. Y. 6.

<sup>6</sup> Leech v. Koenig, 55 Mo. 451.

## CHAPTER II.

## ASSIGNMENT OF THE LEASE.

SECTION 34. Leases may be assigned.

35. Accruing rent.

36. When assignment releases from rent.

37. Lease assigned contrary to its terms.

38. Voidable—not void if terms disregarded.

39. Sub-tenants and their rights.

40. Termination of sub-lease.

41. Leases by corporations.

42. Appurtenances.

43. Partnership leases.

§ 34. **Leases may be assigned.**—All leases except a lease at will may be assigned, if there is no restriction therein.<sup>1</sup> And even if, by the terms of the lease, an assignment is forbidden, yet such an assignment will not render the lease absolutely void, but only voidable.

A landlord may assign the rent to become due upon a lease without assigning the reversion.

The assignee of rent to become due may maintain an action therefor in his own name.<sup>2</sup>

The lessor cannot assign a lease by indorsement, so as to give the assignee such a legal title as can be enforced in his name, although the assignee may, in that way, acquire an equitable title to the rents.

An assignee of a lease who has been recognized as such

<sup>1</sup> *Eldredge v. Bell*, 64 Iowa, 125; *Robinson v. Berry*, 21 Ga. 183; *Jackson v. Groar*, 7 Cow. (N. Y.) 285; *Cooney v. Hayes*, 40 Vt. 478.

<sup>2</sup> *Wineman et al. v. Hughson*, 44 Ill. App. 22.

may sue in his own name for rent, although he has no interest in the reversion.<sup>1</sup>

Equity treats the assignee of a contract, not assignable at law, as the party in interest, and will afford him relief in a proceeding instituted in his own name.

A lessor can assign his interest in a lease by an indorsement on it, so as to pass the equitable right to his assignee to receive the rent when it becomes due.<sup>2</sup>

The power to assign a lease belongs to every lessee, unless he has been restrained by the terms of his lease. It is common to insert as part of the lease, that the tenant shall not assign or underlet the premises without the written permission of the landlord, accompanied by a clause of re-entry in case of breach. And while it seems reasonable that a man shall exercise this restraint, for the purpose of selecting such tenants as he is satisfied will take care of his property and pay rent punctually, yet the courts of law do not favor this restraint.<sup>3</sup>

Where an assignment of a lease for years was by parol and the assignment void, yet, it having become executed and the assignee accepted by the landlord as a tenant, the Statute of Frauds has no application.<sup>4</sup>

An agreement in a lease that the tenant will "remove all rubbish and spalls" at the expiration of his term, runs with the land and is binding upon the assignee of such tenant.<sup>5</sup>

Although the owner of real estate may have leased the

<sup>1</sup> *Watson v. Hankins*, 13 Ia. 547.

<sup>2</sup> *Dixon v. Buell*, 21 Ill. 203; *Chapman v. McGrew*, 20 Ill. 101.

<sup>3</sup> *Church v. Brown*, 15 Ves. 265.

<sup>4</sup> *Bliss v. Gardner et al.*, 2 Ill. App. 422.

<sup>5</sup> *Coppinger et al. v. Armstrong*, 5 Ill. App. 637.

same, he may sell or convey one part of his reversion to one person and the residue to another, and the grantee of the reversion will be liable on his grantor's covenant to renew the lease, for the reason that such covenants run with the lease. Such a covenant is divisible.<sup>1</sup>

The lessor may assign the lease and vest the power in the assignee to collect rent without a transfer of the reversion.<sup>2</sup>

Where a lessor conveys property *pendente lite*, his recovery inures to the benefit of the vendee.<sup>3</sup>

§ 35. **Accruing rent.**—An unqualified conveyance of demised premises passes the rent thereafter to accrue.<sup>4</sup>

Where land is sold that is held by another by virtue of a lease, the grantee in the deed is entitled to recover the rents accruing after the execution and delivery of the deed, unless the deed or agreement otherwise provide.<sup>5</sup>

Accruing rent, when not reserved, passes by the deed to the grantee on a sale of the premises; but until attornment by the tenant, the grantee cannot maintain a suit against the tenant for rent.<sup>6</sup>

Although the tenant cannot dispute the landlord's title, yet in a suit for rent he may show that he has acquired title of his landlord by conveyance to him; and it makes no difference whether the conveyance is directly from the landlord or from a trustee, duly authorized to sell and convey the title by a former owner, provided

<sup>1</sup> *Leiter v. Pike et al.*, 127 Ill. 287.

<sup>2</sup> *Dougherty v. Matthews*, 35 Mo. 520.

<sup>3</sup> *Bell v. Bruhn*, 30 Ill. App. 300.

<sup>4</sup> *Disselhorst v. Cadogan et al.*, 21 Ill. App. 179.

<sup>5</sup> *Neill et al. v. Chesson*, 15 Ill. App. 266.

<sup>6</sup> *Raymond et al. v. Kerker*, 2 Ill. App. 496.



the same is a lien prior to the rights of the landlord. Where there is an express covenant to pay rent for a term of years, the mere acceptance of rent by the lessor from the assignee of the lessee does not discharge the lessee. His contract continues in force, notwithstanding he may have parted with his interest in the estate, unless the lessor enters into such stipulations with the assignee as to accept him as sole tenant and absolve the original lessee.<sup>1</sup>

An assignment of the lease by the lessee does not discharge either the lessee or his surety from the covenants; it does not have this effect even when the lessor recognizes the assignment by accepting rent from the assignee.<sup>2</sup>

**§ 36. When assignment releases from rent.**—Where a tenant has assigned his interest in the lease and the landlord has recognized the assignee as his tenant and accepted rent from him, the lessee is no longer liable to the lessor in the debt for the rent.<sup>3</sup>

If there be not a substitution of the assignee in place of the original lessee and a clear intent to make a new contract with the former and to discharge the latter from further liability under the lease, both will be held liable to the lessor.

Where it is mutually agreed between parties that a lease shall be surrendered, and a new one is thereupon made with another party and the landlord accepts the new party as his tenant, this will estop the landlord thereafter from denying the surrender of the first lease.

<sup>1</sup> Carson et al. v. Crigler, 9 Ill. App. 83.

<sup>2</sup> Grommes et al. v. St. Paul Trust Co. et al., 147 Ill. 634.

<sup>3</sup> Bliss v. Gardner et al., 2 Ill. App. 422.

The assignment of a lease by a tenant, or his sub-letting the premises, with the written assent of the lessor, when this is allowed by the terms of the lease, will not discharge the tenant from his liability to pay the rent agreed to be paid, nor his guarantor. And where the demised premises are used for a saloon, the sale of the saloon by the tenant and the taking of possession by the purchaser and the acceptance of the rent from the latter by the landlord will not operate as a discharge of the guarantor of the first tenant from the payment of the rent thereafter accruing.<sup>1</sup>

In a suit on a lease to recover rent, the tenant may show that the landlord has assigned the lease by a sale of the demised premises, or that he has been evicted by paramount title, which form exceptions to the general rule.<sup>2</sup>

Where a lessee of an unexpired term made a verbal assignment thereof and put his assignee in possession, who paid the rent to the original lessor for about a year, when he ceased to occupy the premises and refused to pay rent thereafter, and the lessor brought suit against him for the subsequently accruing rent, it was held, that the statute of frauds was a bar to the action.<sup>3</sup>

The landlord is entitled to rent that had accrued before the execution of the deed of conveyance, but rent not then matured passes with title and vests in the purchaser.<sup>4</sup>

An administrator or executor can not distrain or sue

<sup>1</sup> *Grommes et al. v. St. Paul Trust Co. et al.*, 147 Ill. 634.

<sup>2</sup> *Doty v. Burdick*, 83 Ill. 473.

<sup>3</sup> *Chicago Attachment Co. v. Davis Sewing Machine Co.*, 142 Ill. 171.

<sup>4</sup> *Carson et al. v. Crigler*, 9 Ill. App. 83.

for rent which accrues after the death of the owner of the land; the rent in such case goes to the heir.<sup>1</sup>

The assignee of a leasehold estate is liable for the rent according to the terms of the lease, and the fact of his liability after the assignment does not discharge the lessee from his covenant to pay rent. In case the rent is not paid by the assignee as it becomes due, an action lies against the lessee therefor, and it makes no difference that the lessor may have received rent from the assignee and accepted him as a tenant of the premises.<sup>2</sup>

**§ 37. Lease assigned contrary to its terms.**—A clause in a lease that the same shall not be assigned without the written assent of the lessor, is for the benefit of the lessor only. It does not render the assignment, when otherwise valid, absolutely void, but voidable only at the option of the lessor or his representatives.<sup>3</sup>

Where a lease states that it shall be binding upon the lessor, his heirs, executors and administrators, but says nothing about assigns, the lessee cannot maintain a suit against a purchaser of the house and premises from the lessor upon a clause in the lease binding the lessor to pay for certain fixtures.<sup>4</sup>

The lessor cannot assign a lease by indorsement, so as to give the assignee such legal interest as can be enforced in his name, although the assignee may in that way acquire an equitable title to the rents.<sup>5</sup>

<sup>1</sup> *Sherman et al. v. Dutch*, 16 Ill. 283.

<sup>2</sup> *Grommes et al. v. St. Paul Trust Co. et al.*, 147 Ill. 634.

<sup>3</sup> *Webster et al. v. Nichols et al.*, 104 Ill. 160.

<sup>4</sup> *Hansen v. Meyer et al.*, 81 Ill. 321.

<sup>5</sup> *Chapman v. McGrew*, 20 Ill. 101.

Where a reversion in a lease has been conveyed and the tenant has attorned to the assignee, all the covenants pass to the assignee, and if the tenant thereafter commits a breach of such covenants, the assignee alone can recover damages therefor.<sup>1</sup>

§ 38. **Voidable—Not void if terms disregarded.**—If the landlord has the right to declare the lease forfeited on account of assignment and he accepts the rent accruing after such assignment, this will be a waiver of his right to declare the lease forfeited; and when a lessor once consents to an assignment, the restriction is then removed forever.<sup>2</sup>

If the provisions of a lease containing such stipulations are violated by the tenant, the landlord may waive his right to declare a forfeiture of the lease. In such case, the assignment would be valid. And in case the lessee covenants not to assign, transfer or set over the lease or premises, it does not prevent him from underletting the same.<sup>3</sup>

Nor will a covenant on part of the tenant, not to let or underlet the whole or any part of the demised premises, preclude him from making an assignment of his whole interest.<sup>4</sup>

However, authorities are not agreed on this point. In *Den v. Post*, 1 Dutch. 285, a covenant against underletting was declared to be a bar to assignment.

<sup>1</sup> Scheidt v. Belz et al., 4 Ill. App. 431.

<sup>2</sup> Murrey v. Harway, 56 N. Y. 347; Chipman v. Emerich, 5 Cal. 49.

<sup>3</sup> Jackson v. Silvernail, 15 Johns. 278; Jackson v. Harrison, 17 Johns. 66; Copland v. Parker, 4 Mich. 660.

<sup>4</sup> Lynde v. Hough, 27 Barb. 415.

*Sub-tenants and Sub-letting.*

§ 39. **Sub-tenants and their rights.**—Provisions in a lease, that upon the re-entry for breach of covenants the landlord may relet the premises for the account of the lessee, holding him for any deficiency, have been uniformly sustained.<sup>1</sup>

A covenant or clause in a lease, that neither the tenant nor his heirs, etc., shall underlet any part of the demised premises or assign the lease, is for the benefit of the lessor alone. If he does not choose to set it up, no one else can.<sup>2</sup>

Where a lease contains a clause prohibiting sub-letting, in case it takes place, receipt of rent by the landlord from the sub-tenant does not release the tenant from his promise to pay.<sup>3</sup>

A tenant cannot sub-let longer than his present term, nor can he charge his sub-tenants with an increased rent by notice to them before renewal of his lease, in case they hold over after their term expires.<sup>4</sup>

An agreement not to let, set or demise the premises, or any part thereof, for the whole or any part of the term, was held to restrain an assignment.<sup>5</sup>

If a lease provides that "if the tenant shall assign the lease, it shall become void," in such case the lease is voidable only and not void.<sup>6</sup>

<sup>1</sup> Grommes et al. v. St. Paul Trust Co., 47 Ill. App. 568.

<sup>2</sup> Sexton v. Chicago Storage Co. et al., 129 Ill. 318.

<sup>3</sup> Grommes et al. v. St. Paul Trust Co., 47 Ill. App. 568.

<sup>4</sup> Sutherland v. Goodnow, et al., 108 Ill. 528.

<sup>5</sup> Greenaway v. Adams, 12 Vesey, 395.

<sup>6</sup> Eldredge v. Bell, 64 Ia. 125; Jackson v. Groat, 7 Cow. (N. Y.) 285.

Where a tenant, without license from the landlord, takes a third person into co-partnership with him and lets such person into joint possession of the premises, it is not a breach of the condition of the lease against sub-letting.<sup>1</sup>

The service by the landlord upon his tenant of a five days' notice under the statute, he having knowledge at the time of a sub-letting which, under the lease, was ground for forfeiture, amounts to a waiver of the forfeiture incurred by such sub-letting.<sup>2</sup>

§ 40. **Termination of sub-lease.**—A termination of the original lease does not always terminate the sub-lease. Where a tenant holds premises under a lease and sub-lets a portion of the premises to a third person, there being no restriction in the lease against sub-letting, and subsequently, without the knowledge or assent of the sub-tenant, surrenders his term to the then owners of the premises, such surrender terminates the original lease and the term created thereby as between the parties to the original lease; but the interest and term of the sub-tenant continue the same as if no surrender had been made. The original landlord becomes the immediate landlord of the sub-tenant with only such rights as the original lessee would have had to the possession of the premises before the expiration of the term.<sup>3</sup>

If a landlord has alienated the reversion during the lease, then his alienee is entitled to possession at its

<sup>1</sup> *Boyd et al. v. Fraternity Hall Ass'n*, 16 Ill. App. 574.

<sup>2</sup> *Frazier et al. v. Caruthers et al.*, 44 Ill. App. 61.

<sup>3</sup> *Eten v. Luyster*, 60 N. Y. 252.

termination; he should make the demand and bring the action.<sup>1</sup>

If the party holding over is a mere wrong-doer, the right of the lessee after the date fixed for the commencement of the tenancy is effectual to dispossess him: the landlord is not entitled to possession and can maintain no action to recover the premises. The right of immediate possession is in the lessee alone and he must bring the action. Therefore, when the tenant is prevented from obtaining the enjoyment of the premises by a former tenant whose tenancy has expired, his remedy is against the latter and not against the lessor.<sup>2</sup>

§ 41. **Leases by corporations.**—The doctrine that a corporation cannot make a contract except under a corporate seal is not in force in this state: a corporation can make a lease not under the seal.<sup>3</sup>

It was formerly held, that a lease by a corporation without the corporate seal is void.<sup>4</sup>

A guardian has no power over the real estate of his wards except to lease on such terms as shall be approved by the County or Probate Court: without such approval a lease made by him is, as to the minors, wholly inoperative.<sup>5</sup>

Where land held by a tenant for years is taken by condemnation proceedings, the tenant remains liable for

<sup>1</sup> Dudley et al. v. Lee, 39 Ill. 339.

<sup>2</sup> Taylor L. & T. See. 312; Hatfield v. Fullerton, 24 Ill. 278; Gardner v. Ketellar, 3 Hill, 330; Cozens v. Stevenson, 5 S. & R. 424; Gozzolo v. Chambers, 73 Ill. 75.

<sup>3</sup> Coppinger et al. v. Armstrong, 8 Ill. App. 210.

<sup>4</sup> Kinzie v. Chicago, 2 Scammon (Ill.), 187.

<sup>5</sup> Field et al. v. Herrick et al., 5 Ill. App. 54.

the entire rent, according to the terms of the lease. The condemnation of the land does not extinguish the lease as between landlord and tenant.<sup>1</sup>

Where the reversion of leased real estate is severed by the condemnation of a part thereof for a street, the tenant will be entitled to an abatement of the rent, according to the value of the several parts of the land.<sup>2</sup>

A lease merges in the fee, when they unite in the same person.<sup>3</sup>

The rent of a house occupied as a residence is a family expense within the meaning of sec. 15, chap. 68, Revised Statutes, and husband and wife are jointly and severally liable for such rent and may be sued jointly or separately.<sup>4</sup>

The possession of a riparian proprietor is to the center thread of a given stream to as full an extent as if included in the terms of the deed under which he claims, and he may maintain replevin for sand or gravel taken therefrom by a trespasser who invades that possession.

A person in possession of lands abutting upon a stream may maintain forcible detainer against one who invades his possession of lands acquired by accretion.<sup>5</sup>

§ 42. **Appurtenances.**—Appurtenances in a lease include only such things as belong to the realty and do not include personal property.<sup>6</sup>

<sup>1</sup> *City of Chicago v. Garrity et al.*, 7 Ill. App. 474.

<sup>2</sup> *Leiter v. Pike et al.*, 127 Ill. 287.

<sup>3</sup> *Carroll v. Ballance*, 26 Ill. 9.

<sup>4</sup> *Illingworth v. Burley*, 33 Ill. App. 394; *Harrison v. Hill*, 37 Ill. App. 32.

<sup>5</sup> *Griffin v. Kirk*, 47 Ill. App. 258.

<sup>6</sup> *Ottumwa Woolen Mills v. Hawley*, 44 Ia. 57; *Scheidt v. Belz*, 4 Ill. App. 431.



An appurtenance means something belonging to another thing and which passes incidentally to the principal thing, but does not include property totally disconnected with the premises.<sup>1</sup>

The Statute of Illinois requires all the jury to sign the verdict in forcible entry and detainer cases.<sup>2</sup>

Where the amount of rent is agreed to be fixed by appraisement and the appraisers refuse to act, the law will not permit a failure of justice and the court will hear evidence and make the appraisement.<sup>3</sup>

Both by the common law and the statute of this State, where a tenant for life gives a lease for a term of years on a yearly rent and dies in the course of a year, before the day of the payment of the rent, the rent cannot be apportioned and the tenant may quit the premises on such death without liability to pay any rent to anyone after the last day appointed for payment.<sup>4</sup>

**§ 43. Partnership leases.**—The covenants of a lease by a partnership firm are joint and several and each individual partner is personally liable thereon.

“Every partnership debt, being joint and several, it follows necessarily that resort may be had, in the first instance, for the debt to the surviving partners or to the assets of the deceased partner.”<sup>5</sup>

<sup>1</sup> Scheidt v. Belz, 4 Ill. App. 43.

<sup>2</sup> Bloom v. Goodner, 1 Ill. 63.

<sup>3</sup> Tobey Furniture Co. v. Rowe, 18 Ill. App. 293.

<sup>4</sup> Hoagland et al. v. Crum, 113 Ill. 365.

<sup>5</sup> Ladd v. Griswold, 4 Gilman, 25; Mason v. Tiffany, 45 Ill. 392; Silverman v. Chase, Exr., 90 Ill. 42; Dunn v. Jaffray, 36 Kansas, 408.

## CHAPTER III.

## FORCIBLE ENTRY AND DETAINER.

SECTION 44. The Illinois Statute.

45. The purpose of the action and when it will lie.

46. Forcible entry forbidden.

47. Definition.

48. Nature of the action.

49. The remedy.

50. Two wrongs in one name.

§ 44. **The Illinois Statute.**—The Statute of the State of Illinois, on the subject of Forcible Entry and Detainer, is as follows, viz. :

SECTION 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, that no person shall make an entry into lands or tenements except in cases where entry is allowed by law, and in such cases he shall not enter with force, but in a peaceable manner.

§ 45. **The purpose of the action, and when it will lie.**

SEC. 2. The person entitled to the possession of lands or tenements may be restored thereto in the manner hereafter provided :

*First.* When a forcible entry is made thereon.

*Second.* When a peaceable entry is made and the possession unlawfully withheld.

*Third.* When entry is made into vacant or unoccupied lands or tenements without right or title.

*Fourth.* When any lessee of the lands or tenements, or any person holding under him, holds possession without right, after the determination of the lease or tenancy by its own limitation, condition or terms, or by notice to quit, or otherwise.

*Fifth.* When a vendee, having obtained possession under a written or verbal agreement to purchase lands or tenements and having failed to comply with his agreement, withholds possession thereof after demand in writing by the person entitled to such possession.

*Sixth.* When lands or tenements have been conveyed by any grantor in possession, or sold under the judgment or decree of any court in this State, or by virtue of any sale in any mortgage or deed of trust contained, and the grantor in possession, or party to such judgment or decree, or to such mortgage or deed of trust, after the expiration of the time of redemption, when redemption is allowed by law, refuses or neglects to surrender possession thereof after demand in writing by the person entitled thereto, or his agent.

#### *Demand—Service—Return.*

SEC. 3. The demand required by the preceding section may be made by delivering a copy thereof to the tenant, or by leaving such a copy with some person above the age of twelve years, residing on, or being in charge of, the premises; or in case no one is in actual possession of the premises, then by posting the same on the premises. When any such demand is made by an officer authorized to serve process, his return shall be *prima facie* evidence of the facts therein stated; and if such demand is made

by any person, not an officer, the return may be sworn to by the person serving the same and shall then be *prima facie* evidence of the facts therein stated. Which demand for possession may be in the following form :

To..... :

I hereby demand immediate possession of the following described premises (describing the same), which demand shall be signed by the person claiming such possession, his agent or attorney.

### *Growing Crops.*

SEC. 4. In case of forfeiture under contract of purchase, the purchaser shall be entitled to cultivate and gather the crops, if any, planted by him and grown or growing on the premises at the time of the commencement of the suit, and shall have the right to enter for the purpose of removing such crops, first paying or tendering to the party entitled to the possession a reasonable compensation for such use of the land before removing the crops.

### *Complaint—Summons.*

SEC. 5. On complaint in writing by the party or parties entitled to the possession of such premises being filed in any court of record, or with any justice of the peace in the county where such premises are situated, stating that such party is entitled to the possession of such premises (describing the same with reasonable certainty), and that the defendant (naming him) unlawfully withholds the possession thereof from him or them, the clerk of such court or such justice of the peace shall

issue a summons directed to the sheriff or any constable of his county to execute; which summons, when issued by a justice of the peace, may be substantially in the following form:

STATE OF ILLINOIS, }  
COUNTY OF COOK, } ss.

The People of the State of Illinois, to the Sheriff or any Constable in said County—*Greeting*:

You are hereby commanded to summon ..... to appear before ....., at ....., on the ... day of ....., A. D., ....., at .... o'clock ... m., to answer the complaint of ....., wherefore he unlawfully withholds from him the possession of certain premises in said county (describing the premises), and hereof make due return, as the law directs.

Given under my hand this .... day of ....., A. D., 18...

*Summons from Court of Record.*

SEC. 6. When a summons is issued out of a court of record, it may be in like form as other summons issued out of such court.

*Summons from Justice of Peace.*

SEC. 7. When the summons is issued by a justice of the peace, it shall specify a certain place, day and hour for the trial, not less than five nor more than fifteen days from the date of the summons.

*Summons from Court.*

SEC. 8. When the summons is issued out of a court of record, the summons shall be made returnable on the first day of the next succeeding term of said court, and if not served ten days before the first day of the next term, the cause shall be continued to the next term of court.

*Service of Summons—Return—Publication.*

SEC. 9. Service of summons shall be made by delivering a copy thereof to the defendant, or by leaving such copy at his usual place of abode, with some person of the family, of the age of twelve years or upwards, and informing such person of the contents thereof. The manner of the service, and the date thereof, shall be indorsed on the back of said summons by the officer serving the same. When service cannot be had as provided in this section, and it shall appear by affidavit or the return of the officer that the defendant is not a resident of this State, or has departed from this State, or on due inquiry cannot be found, or is concealed within this State so that process cannot be served upon him, then, if the suit is in a court of record, service may be had by notice, as in case of attachment in court of record, or, if the suit is before a justice of the peace, by notice, as in case of attachment before justices of the peace.

*Jury Trial Before Justice.*

SEC. 10. In trials under this Act before Justices of the

peace, either party may have the case tried by a jury, if he shall so determine before the trial is entered upon, and will first advance the fees of the jurors. The number of the jurors shall be six, or any greater number not exceeding twelve, as either party may desire.

*Trial in Court of Record—Pleading.*

SEC. 11. Trials under this Act in courts of record shall be the same as in other cases at law in such courts; provided no special pleading shall be required; but the defendant may, under the plea of "not guilty," give in evidence any matter in defense of the action.

*Default—Trial Ex Parte.*

SEC. 12. If the defendant does not appear (having been duly summoned as herein provided), the trial may proceed *ex parte*, and may be tried by the justice of the peace or judge of the court, without the intervention of a jury.

*Plaintiff Entitled to Whole Premises—Judgment—Execution—Costs.*

SEC. 13. If it shall appear on the trial that the plaintiff is entitled to the possession of the whole of the premises claimed, he shall have judgment and execution for the possession thereof and for his costs.

*Plaintiff Entitled to Part—Judgment—Execution—Costs.*

SEC. 14. If it shall appear that the plaintiff is entitled to the possession of only a part of the premises claimed,

the judgment and execution shall be for that part only and for costs, and for the residue the defendant shall be found not guilty.

*Several Occupants.*

SEC. 15. Whenever there shall have been one lease for the whole of certain premises, and the actual possession thereof, at the commencement of the suit, shall be divided in severalty among persons with, or other than, the lessee, in one or more portions or parcels, separately or severally held or occupied, all or so many of such persons, with the lessee, as the plaintiff may elect, may be joined as defendants in one suit, and the recovery against them, with costs, shall be several, according as their actual holdings shall respectively be found to be.

*Non-suit—Defendant Recovers Costs.*

SEC. 16. If the plaintiff is non-suited, or fails to prove his right to possession, the defendant shall have judgment and execution for costs.

*Dismissal as to Part—Judgment as to Part.*

SEC. 17. The plaintiff may at any time dismiss his suit as to any one or more of the defendants, and the jury or court may find any one or more of the defendants guilty and the others not guilty, and the court shall thereupon render judgment according to such finding.

*Appeal—Writ of Restitution—Bond.*

SEC. 18. If any party shall feel aggrieved by the ver-



dict of the jury or decision of the court, upon any trial had under this Act, such party may have an appeal, to be taken to the same courts, in the same manner, and tried in the same way as appeals are taken and tried in other cases. Provided, the appeal is prayed and bond is filed within five (5) days from the rendition of the judgment, and no writ of restitution shall be issued in any case until the expiration of five days.

*Defendant's Appeal Bond—New Bonds.*

SEC. 19. If the defendant appeals, the condition of the bond shall be, that he will prosecute such appeal with effect and pay all rent then due or that may become due before the final determination of the suit, and also all damages and loss which the plaintiff may sustain by reason of the withholding of the premises in controversy and by reason of any injury done thereto during such withholding, until the restitution of the possession thereof to the plaintiff, together with all costs that may accrue in case the judgment from which the appeal is taken, is affirmed or appeal dismissed; which said bond shall be in sufficient amount to secure such rent, damages and costs, to be ascertained and fixed by the court. And the court in which the appeal may be pending may require a new bond in a larger amount, if necessary, to secure the rights of the parties; and in case of continuance, may require another bond to be given to further secure the same.

*Plaintiff's Appeal Bond.*

SEC. 20. If the plaintiff appeals, the condition of the

bond shall be, as in other cases of appeal, when taken by the plaintiff, except as otherwise provided by law.

*Repeal.*

SEC. 21. Chapter 43 of the Revised Statutes of 1845, entitled "Forceful Entry and Detainer," and an Act entitled "An Act in regard to forcible entry and detainer," approved April 10, 1872, and all other Acts and parts of Acts inconsistent with the provisions of this Act, are hereby repealed, except as herein re-enacted: Provided, that this section shall not be so construed as to affect any rights existing or actions pending at the time this Act shall take effect.

§ 46. **Forceful entry forbidden.**—SECTION 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly, that no person shall make an entry into lands or tenements except in cases where entry is allowed by law, and in such cases he shall not enter with force, but in a peaceable manner.

§ 47. **Definition.**—Originally, by the common law, it was allowable for every person disseised or turned out of possession, unless the right had been forfeited by neglect or other circumstance, to forcibly take possession of the lands from which he had been so wrongfully ousted. But this course was found very prejudicial to the public peace, and it was found necessary to enact statutes to restrain all persons from the use of such violent methods of doing themselves justice—and with much greater reason where the party seeking redress may have no justice in his claim—and it became the law as early as the year 1380 (5 Rich. II. St. 1, Chap. 8) that all forcible

entries were punished by imprisonment at the king's will.

The injury to be redressed is the ouster or dispossession of a freehold or chattels real by disseisin. "Disseisin is a wrongful putting out of him that is seised of a freehold." Whatever may be the nature of the ouster or dispossession or detainer, the party entitled to possession has no right to use force to dispossess the occupant. The Supreme Court has held in *Doty v. Burdick*, 83 Ill. Reps. 477, as follows: Under our law, whatever it may be in other jurisdictions, the landlord has no right to take the law into his own hands and employ force and use violence to regain possession, although such possession may be wrongful. It would lead to violence, if not to bloodshed, and hence would be contrary to sound policy, and is forbidden.<sup>1</sup>

A party in peaceable possession of land can not be forcibly expelled. The motives of a party who expels another are immaterial; the owner of land is liable in forcible entry and detainer, if he makes a forcible entry on the actual possession of the plaintiff.<sup>2</sup>

So that the only lawful way of obtaining possession of property wrongfully withheld from the owner, is by the action of forcible entry and detainer, as it is called, or by the action of ejectment.

Ejectment is the action when the title is brought into question; but when the possession and right of posses-

<sup>1</sup> *Reeder et al. v. Purdy et ux.*, 41 Ill. 284; *Page et al. v. De Puy*, 40 Ill. 506; *Farwell et al. v. Warren*, 51 Ill. 467; *Baker v. Hays*, 28 Ill. 387.

<sup>2</sup> *Huftalin v. Misner*, 70 Ill. 205; *Westcott v. Arbuckle et al.*, 12 Bradw. 579; *Doty v. Burdick*, 83 Ill. 473.

sion are the only questions to be tried, the action of forcible entry and detainer is the remedy most appropriate and expeditious.

While the action of forcible entry and detainer, as now used, is not a common law action, yet it is an action at law relating to real property.

§ 48. **Nature of the action.**—Forcible entry and detainer is essentially an action given to protect actual occupation of real estate against unlawful and forcible invasion, to remove occasion for acts of violence in defending such possession and to punish a breach of the peace committed in the entry upon or the detainer of real property.<sup>1</sup>

Forcible entry and the unlawful holding of possession of lands and tenements has been regarded as an offense of such serious nature, that in many states it has been indictable and in all of the states the laws respecting it are very stringent, usually providing for the trial of the right of possession with the least delay consistent with justice. And while this is true, the Roman Civil Law and the laws of many of the states, in their anxiety to preserve the peace, forbid that even the owner of property should take possession of the same by violence, illustrating that the liberty of the use and enjoyment of the property of the American citizen is a *liberty regulated by law*.

The main object of this action is to preserve the public peace and prevent parties from asserting their rights, real or supposed, by force and violence. The action will lie irrespective of the question as to whether the defendant had the legal right to possession or a right of entry, the

<sup>1</sup> Dotson v. The State, 6 Coldw. (Tenn.) 545.

gist of the action being the entry and detainer by force and violence and the ousting from a peaceable possession, contrary to law.<sup>1</sup>

In the State of Illinois, the action of forcible entry and detainer has been changed to a civil proceeding.<sup>2</sup>

The action of forcible detainer, while it is not a common law action, is an action at law relating to real property.<sup>3</sup>

In the States generally, the criminal remedy has fallen into disuse and the civil one alone is in vogue.<sup>4</sup>

In this State the Supreme Court said the action of forcible entry and detainer is purely a civil remedy, the sole object of which is to regain a possession which has been invaded, and the only judgment that can be rendered is, that the plaintiff have restitution of the premises of which he has been unjustly deprived.<sup>5</sup>

§ 49. **The remedy.**—But generally the remedy for this offense is twofold; by indictment at common law and by proceedings under the several statutes relating to forcible entry and detainer. The common law remedy is purely criminal in its nature, but the action under the statute is a civil remedy. Thus we find it said, that the common law affords no civil remedy against a person who, having a right, enters forcibly, but the injured party must apply to the statutory action of forcible entry and detainer.<sup>6</sup>

The civil and criminal remedy cannot be pursued in

<sup>1</sup> Reeder et al. v. Purdy et al., 41 Ill. 279.

<sup>2</sup> Thompson v. Sornberger, 59 Ill. 326.

<sup>3</sup> St. Louis National Stock-Yards v. Wiggins Ferry Co., 102 Ill. 514.

<sup>4</sup> 2d Whart. Cr. L., sec. 1083.

<sup>5</sup> Robinson v. Crummer, 5 Gilman (Ill.), 218.

<sup>6</sup> Robinson v. Crummer, 5 Gilm. (Ill.) 218; Tucker v. Phillips, 2 Metcalf (Ky.), 416.

the same proceeding: that is, a writ of restitution cannot be awarded on conviction in a criminal case, but gets its authority by virtue of the statutory proceeding.<sup>1</sup>

Where the remedy has not been changed by statute, an indictment may be supported at common law for a forcible entry and detainer, but to justify an indictment, it seems the entry must appear to have been accompanied by a breach of the peace.<sup>2</sup>

§ 50. **Two wrongs in one name.**—A forcible entry is defined to be the offense or wrong of taking possession, by exercise of strength or compulsory power, of lands or tenements against the will of the person entitled to the possession and without authority of law. While the two wrongs of forcible entry and forcible detainer are distinguishable in their nature, they are usually connected under one name. The degree of force and the particular wrongs necessary to support the action are regulated to a great extent by the statutes of the various States.

A forcible detainer is defined to be the offense of keeping possession of real property by strength and by arrangement to exclude the adverse claimant, and without authority of law. A forcible detainer may take place either after a forcible or a peaceable entry.<sup>3</sup>

The action of forcible entry and detainer, or forcible detainer, being a special statutory proceeding, summary in its nature and in derogation of the common law, must

<sup>1</sup> State v. Walker. 5 Sneed (Tenn.), 259.

<sup>2</sup> Commonwealth v. Shattuck. 4 Cush. 141; Rex v. Nichols, 1 Kenyon, 512.

<sup>3</sup> Abbott's Law Dictionary. 1 Bishop, Criminal Law, Sec. 536.

be strictly pursued, otherwise the proceeding is *coram non judice*.<sup>1</sup>

The action of forcible entry and detainer abates upon the death of a party during its pendency.<sup>2</sup>

Forcible entry and detainer are in substance and in principle but one offense and are treated of in the books together as "Forcible Entry and Detainer;" but they are distinct and different acts. The forcible entry was an offense at common law and the detainer is punishable by statute only.<sup>3</sup>

In Arkansas, forcible entry and detainer is a tort, pure and simple. Force is the gist of the action. The remedy is designed to protect the actual possession, whether rightful or wrongful.<sup>4</sup>

<sup>1</sup> French v. Miller, 126 Ill. 611.

<sup>2</sup> Havens v. Bickford, 9 Humph. (Tenn.) 673.

<sup>3</sup> Commonwealth v. Toram, 2 Pars. (Pa.) Sel. Cas. 411.

<sup>4</sup> Johnson v. West, 41 Ark. 535.

## CHAPTER IV.

## WHEN THE ACTION WILL LIE.

## SECOND.—

- SECTION 51. Statutory provisions.  
 52. What force necessary.  
 53. When the owner may enter peaceably.  
 54. Peaceable entry defined.  
 55. Who liable in this action.  
 56. What constitutes forcible entry.  
 57. Detention after demand unlawful.  
 58. Actual force not necessary.

## THIRD.—FOR ENTRY UPON VACANT LANDS.

59. The action will lie for entry upon vacant lands.  
 60. Owner deemed to have possession.

## FOURTH.—AGAINST A TENANT HOLDING OVER.

61. The fourth cause of action.  
 62. Possession by fraud.  
 63. Sub-tenants.  
 64. Holding over after term expires.  
 65. Possession under lessee.  
 66. What complaint must show.  
 67. Conclusive possession.

## FIFTH.—AGAINST A PURCHASER WHO FAILS TO COMPLY WITH THE CONTRACT OF PURCHASE.

68. The fifth statutory cause of action.  
 69. Who may sue under this clause.  
 70. What necessary to give jurisdiction.  
 71. Growing crops.

SIXTH.—WHERE THE PREMISES, HAVE BEEN SOLD  
AT JUDICIAL SALE.

72. The sixth cause of action.



SECTION 73. When right first given.

74. Detention of premises after sale.

75. Against whom suit brought.

76. Demand necessary.

77. The proof necessary.

78. Judicial sales.

79. What steps necessary to recover under this clause.

## § 51. Statutory provisions.

SEC. 2. The person entitled to the possession of lands or tenements may be restored thereto in the manner hereafter provided :

### *First—When a Forcible Entry is Made Thereon.*

In law, the phrase “forcible entry” means the unlawful and violent entry and taking possession of lands or tenements with actual force or violence.

A forcible entry and detainer is a violent taking and keeping possession by one of any lands and tenements occupied by another, by means of threat, force or arms, and without authority of law.<sup>1</sup>

A party claiming the possession of lands and tenements should not take them “with strong hand nor with a multitude of people;” even the owner of land is liable in forcible entry and detainer if he makes a forcible entry upon the actual possession of the plaintiff.<sup>2</sup>

Although a landlord is wrongfully kept out of possession, he has no right to resort to force to effect an entry. Such an entry is unlawful, and being so, an action for trespass will lie.<sup>3</sup>

<sup>1</sup> 1 Bouv. Dict. 598; 4 Black. Com. 148.

<sup>2</sup> Huftalin v. Misner, 70 Ill. 205.

<sup>3</sup> Wilder et al. v. House, 48 Ill. 279.

In Missouri, any person who shall enter upon any lands with force or strong hand, shall be deemed guilty of a forcible entry.<sup>1</sup>

The fact that the tenancy of a house has terminated and the tenant has promised to leave on a particular day, does not justify the landlord under the statute in putting him out by force; but if the tenant leave the house with his family and furniture and lock the door, the landlord may break into his own house without violating the statute. But in case the tenant is only temporarily absent, he would not have the right to break open the door.<sup>2</sup>

Expulsion by force, without resort to legal process, of an occupant of the premises is illegal.

**§ 52. What force necessary.**—On the question of what constitutes a forcible detainer, it has been held, that the mere act of nailing up the door of an house does not amount to retaining forcible possession of it.<sup>3</sup>

In cases where the remedy has been extended by statute to include tenants holding over, grantors and vendors refusing to yield possession, the force required to constitute a forcible detainer is constructive only and all that is necessary is that the tenant, grantor, or other person having possession refuses to yield it to the person entitled thereto after his right to it has been duly terminated or parted with.<sup>4</sup>

To constitute a forcible entry and detainer under the

<sup>1</sup> *Emerson v. Sturgeon*, 59 Mo. 404.

<sup>2</sup> *Hillary v. Gay*, 6 C. & P. 284; *Mason v. Powell*, 38 N. J. 576.

<sup>3</sup> *Hopkins v. Buck*, 3 A. K. Marsh, 110.

<sup>4</sup> *Doty v. Burdick*, 83 Ill. 473; *Davis v. Woodward*, 19 Minn. 137.

statute, actual force is not necessary.<sup>1</sup> Originally, actual force was necessary.<sup>1</sup>

To constitute forcible entry and detainer, violence is not essential, and entry against the will of another is forcible in legal contemplation.<sup>2</sup>

**§ 53. When the owner may enter peaceably.**—The owner of land, having the present right of immediate possession, may enter the same peaceably, though occupied by another, without becoming a trespasser.<sup>3</sup>

In this State it has been constantly held, that any entry is forcible within the meaning of the law that is made against the will of the occupant. The language of the Supreme Court is as follows: "We state, then, after a full examination of this subject, that in our opinion the statutes on forcible entry and detainer should be construed as taking away the previous common law right of forcible entry by the owner, and that such entry must be therefore held illegal in all forms of action."<sup>4</sup>

The use of force and violence is an offense of itself, for which, he who uses it may be indicted and punished. Whatever may be the legal rights of the parties, the lawfulness of the entry in no wise excuses the violence used to obtain the possession.<sup>5</sup>

There is a distinction between cases where the original entry was forcible and those where it was peaceable and the detention alone is wrongful and tortious.

<sup>1</sup> *Atkinson v. Lester et al.*, 2 Ill. 407; *Bloom v. Goodner*, 1 Ill. 63.

<sup>2</sup> *Croff v. Ballinger*, 18 Ill. 200.

<sup>3</sup> *City of Bloomington et al. v. Brophy*, 32 Ill. App. 400.

<sup>4</sup> *Reeder et al. v. Purdy et ux.*, 41 Ill. 279.

<sup>5</sup> *Commonwealth v. Kensey*, 2 Pars. (Pa.) Sel. Cas. 401.

Where the entry is forcible, the right of entry is complete as soon as the entry is made in the person whose possession is thus tortiously invaded; but where the entry is made peaceably and without force, it is the detention alone that is unlawful and tortious and no right of action exists until after demand for possession.<sup>1</sup>

§ 54. **Forcible entry defined.**—Originally a forcible entry was where the possession of plaintiff was invaded by force; but it is not now necessary to give the right of action, that any actual force should be resorted to, the Supreme Court having uniformly held that, in an action of forcible entry and detainer, or in a forcible detainer, constructive force only is necessary. A mere wrongful entry or wrongful holding over only is required: as in that case, as soon as the detention becomes illegal, it is, in contemplation of law, forcible.<sup>2</sup>

Of course, in a forcible invasion of the rightful possession, the offense is consummated as soon as the entry is made, and at that moment the right of action vests in the party entitled to possession. Where a person entered upon the possession of another without his consent, and by removing the fence and resetting the same, took possession of a strip or parcel thereof, it is a forcible entry under the terms of the statute and sufficient to support the action.<sup>3</sup>

Where the entry is lawful and the possession is unlawfully detained, as in case of landlord and tenant, then

<sup>1</sup> Thomasson v. Wilson, 46 Ill. App. 398.

<sup>2</sup> Dudley et al. v. Lee, 39 Ill. 342; Doty v. Burdick, 83 Ill. 473; Smith v. Hoag, 45 Ill. 250.

<sup>3</sup> Coverdale v. Curry, 48 Ill. App. 213.

the right of action vests in the rightful landlord, as soon as the tenant's right of possession ceases under his lease. Or, in case of an alienation by the landlord during the existence of the lease, then the grantee of the landlord is entitled to possession by operation of law, on the determination of the lease, and the right of action vests in him.

Every entry against the will of the occupant is forcible in the meaning of our statute.<sup>1</sup>

The owner of real estate has a right to enter upon and enjoy his own property if he can do so without a forcible disturbance of the possession of another; but the peace and good order of society require, that he shall not be permitted to enter against the will of the occupant, and hence the common law right to use all necessary force has been taken away. His remedy must be sought through those peaceful agencies which a civilized community provides for all its members.<sup>2</sup>

**§ 55. Who liable in this action.**—The statute of Illinois specially provides, that the tenant, or any person claiming under him, may be liable to this action; but it seems, that while the action will lie against a person who makes a forcible entry, it will also lie against any person going in under the person who made such forcible entry collusively, with the knowledge of such force and for the purpose of availing himself of it, because such person might well be considered as himself committing the forcible entry. But we cannot hold, that one taking possession in good faith, in violation of no law, is liable to be turned out by this

<sup>1</sup> Croff v. Ballinger, 18 Ill. 200.

<sup>2</sup> Reeder et al. v. Purdy et ux., 41 Ill. 279.

summary remedy, because the person from whom he purchases may, years ago, have made an entry by force. How can a purchaser be said to be guilty of an unlawful act of which he has never heard? In order to reach him in this action, the plaintiff must show him to have been in some way privy to the unlawful entry, or to have so acted, that he may fairly be considered as adopting it and making the act his own. If we were to hold the contrary rule, the result would be, that the honest occupant of land, who had entered peaceably and in good faith, would be liable to be visited with a punishment designed only for the wrongdoer.<sup>1</sup>

Under our statute, although the landlord may be wrongfully kept out of the possession, he has no right to use force to effect an entry. In case he should do so, an action of trespass will lie against him.<sup>2</sup>

**§ 56. What constitutes forcible entry.**—Entry by violence or breach of the peace is not necessary. Forcible entry does not necessarily mean the taking of real estate from the possession of another by breach of the peace. The taking of such property by opening a gate and removing cattle or other stock therefrom, against the will of the one occupying such property, is a forcible entry under the law.

No one, not even the owner, has the right to forcibly take real estate from the possession of another, no matter how justly he may be entitled to it; and if the owner takes such possession against the will of the person in

<sup>1</sup> *Ballance v. Curtenius et al.*, 3 Gil. (Ill.) 449; *Clark v. Barker*, 44 Ill. 349.

<sup>2</sup> *Wilder et al. v. House*, 48 Ill. 279.

possession, he will be liable in an action of forcible entry and detainer, even though no violence is employed, and even though the occupant's possession may be unlawful.<sup>1</sup>

Under the statute of forcible entry, actual violence amounting to a breach of the peace is not necessary in any case. Force and violence, short of a breach of the peace, are sufficient where the entry is required to be forcible.<sup>2</sup>

Where a lease authorizes the landlord to enter into the possession of the leased premises, with or without process of law and expel or remove the tenant or any other person occupying the premises, and to use such force as may be necessary in so doing, and to regain and repossess the premises, in case the tenant holds over, the landlord may enter and remove the tenant therefrom, after the expiration of the term of the lease, using no unnecessary force for the purpose, and a tenant can maintain no action of trespass therefor.<sup>3</sup>

*Second—The Action Will Lie for Unlawfully Withholding Possession.*

When a peaceable entry is made, and the possession unlawfully withheld.

§ 57. **Detention after demand unlawful.**—Every detention of premises by persons who have intruded into the possession of another, after demand duly made, becomes an unlawful detention, however peaceable the entry may have been made.<sup>4</sup>

<sup>1</sup> Phelps v. Randolph, 147 Ill. 335.

<sup>2</sup> Smith v. Hoag, 45 Ill. 250.

<sup>3</sup> Fabri v. Bryan et al., 80 Ill. 182.

<sup>4</sup> Thomasson v. Wilson, 146 Ill. 384.

Where a person entered into the possession of the premises peaceably and in good faith as the tenant of a purchaser from one who had previously made a forcible entry, the tenant, or even his landlord, not being privy to the wrongful act of the grantor or having any knowledge of it, such occupant is not liable to be turned out by this summary remedy; but the action will probably lie against any person going in under the person who made the forcible entry collusively, with knowledge of such force and for the purpose of availing himself of it, because such person might well be considered as himself committing the forcible entry.<sup>1</sup>

In this form of action, it is not perceived that payment of taxes on the lands tends to prove an issue in the case, nor does ownership. The whole question is one of actual possession, and a forcible entry upon that possession, and not of payment of taxes or of mere acts of ownership not amounting to actual possession. Possession is a fact that is in no just sense dependent on the payment of taxes, whether in good or bad faith or upon acts of ownership not constituting possession. There are acts which imply an assertion of title, which do not constitute actual possession. The recording of title papers, the offer to sell or lease the land, a sale of timber or stone, the bringing of suits to recover for trespasses, the license of other persons to take wood, coal or stone from the premises, are all acts which indicate an assertion of ownership, but none of them, nor even all of them, will support a forcible entry and detainer.<sup>2</sup>

<sup>1</sup> Clark v. Barker, 44 Ill. 349.

<sup>2</sup> McCartner v. McMullen, 38 Ill. 237.



§ 58. **Actual force not necessary.**—To constitute forcible entry and detainer under the statute of this State, it is not necessary that actual force and physical violence should be used.<sup>1</sup>

Where the father permits his son to occupy his barn continuously with himself, for a long time, under no contract or agreement, this will not vest in the son any right in the property or to its possession. It amounts only to an implied license, subject to revocation by notice, at any time. In such case, the action of forcible entry and detainer by the father against the son for the possession will lie.<sup>2</sup>

*Third—For Entry into Vacant Lands.*

§ 59. **The action will lie for entry upon vacant lands.**—When entry is made into vacant or unoccupied lands or tenements without right or title, this action will lie.

In the case of unoccupied lands, acts which indicate an assertion of ownership only, do not constitute a possession that will support an action of forcible entry and detainer.<sup>3</sup>

In the case of *Childs v. Stephens*, 3 A. K. Marsh, 347, the court held, that there might be a possession without the plaintiff being on the land when the entry was made. On the English and American authorities, the court held, that the right of entry was not a question in this form of action, but simply the possession. In that case, a tenant gave notice to his landlord that he would surrender possession on a specified day, and, in accordance with

<sup>1</sup> Atkinson v. Lester et al., 1 Scam. (Ill.) 407.

<sup>2</sup> Dunstedter v. Dunstedter, 77 Ill. 580.

<sup>3</sup> McCartney v. McMullen, 38 Ill. 237.

the notice, removed from the premises, but the landlord failed to attend. Afterwards the landlord's agent went on to the place, laid up the fences, laid the foundation for a house and burned a plant-bed. The defendant, whilst no person was residing on the place, moved in and occupied the premises. The court on this evidence found, that the jury were warranted in finding a verdict in favor of the plaintiff.<sup>1</sup>

§ 60. **Owner deemed to have possession.**—Whoever has title to unoccupied lands, is deemed to be in possession for all purposes in defense or protection of his rights.<sup>2</sup>

The claim of land by virtue of the pre-emption laws of the United States, without occupation or enclosure of the same, is not sufficient to sustain the action.<sup>3</sup>

A. peaceably entered into unoccupied premises. B. procured A.'s arrest without warrant, and while A. was thus in custody, B. took forcible possession of the premises and removed A.'s goods. In this case, A. could maintain the action of forcible entry and detainer.<sup>4</sup>

*Fourth—Against a Tenant Holding Over.*

§ 61. **The fourth cause of action.**—The action will lie when any lessee of the lands or tenements, or any person holding under him, holds possession without right, after the termination of the lease or tenancy by its own limitation, conditions or terms, or by notice to quit, or otherwise.

<sup>1</sup> McCartney v. McMullen, 38 Ill. 237.

<sup>2</sup> Brooks v. Bruyn, 18 Ill. 539.

<sup>3</sup> Barlow v. Burns, 40 Cal. 351.

<sup>4</sup> Pratt v. Stone et al., 10 Ill. App. 633.

The possession of the tenant cannot avail the landlord to any greater extent than it would the tenant if he was claiming and holding for himself.<sup>1</sup>

§ 62. **Possession by fraud.**—By procuring the possession from the tenant of the defendant, the party so procuring the possession stepped into the tenant's shoes and must hold the possession in the same capacity as the tenant did, to whose rights alone, he succeeded. Such is acknowledged to be the law, the policy of which is very manifest. It is to prevent any party from tampering with the tenant to whom the possession of land has been confided; it is to prevent a tenant from betraying the rights and interests of the landlord from whom he obtained the possession. The law will compel the tenant to act in good faith toward his landlord.<sup>2</sup>

A landlord who has recovered judgment in an action of forcible entry and detainer against his tenant, may, under the writ, dispossess a sub-tenant who is not a party to the suit, if such sub-tenant has entered *pendente lite*, but not so if he was previously in possession. Our statute in terms contemplates an action against the sub-tenant, and so it has been construed by this court. This court held, as a principle of universal law, that a person cannot be turned out of his possession by virtue of a judgment and execution in a proceeding to which he was not a party, unless he entered *pendente lite*.<sup>3</sup>

<sup>1</sup> Patterson et al. v. Hubbard et al., 30 Ill. 201; Messingill v. Boyles, 11 Humphrey, 112.

<sup>2</sup> McCartney v. Hunt et al., 16 Ill. 76.

<sup>3</sup> Clark v. Barker, 44 Ill. 349; Reed v. Hawley, 45 Ill. 40; Brush v. Fowler, 36 Ill. 53; Leindecker et al. v. Waldron, 52 Ill. 283.

§ 63. **Sub-tenants.**—Where a lessee of premises has sublet a portion of the same and afterwards forfeits his own lease by non-payment of rent and is evicted, an action of forcible detainer will lie by the landlord against the sub-tenant to recover possession of the portion of the premises held by him; and this is true, even if the landlord had consented to the sub-letting.<sup>1</sup>

The theory upon which this doctrine is based is, that whenever a suit will lie against the tenant, it will lie against the sub-tenant. This must be so from the nature of the sub-tenant's holding; it rests entirely upon the original lease and must fall with that. If that is forfeited, the right of the sub-tenant is gone and he may be evicted by forcible detainer as well as the original lessee. It would be a mockery of the rights of the landlord if we were to hold that, where the lessee of a house containing a dozen rooms had sub-let a single room and afterwards forfeits his own lease by non-payment of rent and is evicted, the sub-tenant can nevertheless retain possession of the room rented to him if he promptly pays his own rent, or can be evicted only by the slow and expensive action of ejectment.<sup>2</sup>

Where a landlord had made a second lease, to commence from the close of the first term, action against the first tenant holding over was properly brought by the second tenant, who alone was entitled to the possession at that time.<sup>3</sup>

The action lies by a lessor against a person to whom

<sup>1</sup> Patchell & Turner v. Johnston, 64 Ill. 305.

<sup>2</sup> Patchell & Turner v. Johnston, 64 Ill. 305.

<sup>3</sup> Ball v. Chadwick et al., 46 Ill. 28.

his lessee has attorned and who has turned such lessee out of possession.<sup>1</sup>

Under former statutes, a demand was required before commencing suit in forcible entry and detainer, whether the tenancy expired by expiration of the term or by forfeiture and notice to quit.<sup>2</sup>

But under the statute of 1845 it was held, that a demand before the end of the term would not authorize the action.<sup>3</sup>

**§ 64. Holding over after term expires.**—If a tenant wrongfully holds over after the expiration of his term and refuses to surrender the leased premises, the landlord's remedy is by action of forcible detainer or ejectment. But if the landlord, during the temporary absence of the tenant, enters and removes the tenant's stock and other property therefrom and excludes the tenant, the latter may be restored to his possession by the action of forcible entry and detainer.<sup>4</sup>

Suit on a lease to recover rent must be against the defendant in the same capacity in which he signed the lease.<sup>5</sup>

A suit of forcible detainer cannot be maintained against several persons who hold in severalty; but in certain cases, where the action is joint in its conception and afterwards the tenancy is several, all may be joined in one suit, though the verdict and judgment must be several.<sup>6</sup>

<sup>1</sup> Cox v. Cunningham, 77 Ill. 545.

<sup>2</sup> Ball v. Peck, 43 Ill. 482.

<sup>3</sup> Doran v. Gillespie, 54 Ill. 366.

<sup>4</sup> Phelps v. Randolph, 147 Ill. 335.

<sup>5</sup> Neufeld v. Beidler, 37 Ill. App. 34.

<sup>6</sup> Gould et al. v. Hendrickson, 9 Ill. App. 171.

A party cannot bring separate suits for several sums past due on a lease; if more than one payment is due, these payments should be consolidated into one suit.<sup>1</sup>

Under our statute, the action of forcible entry and detainer lies against a sub-lessee holding over after the termination of the original lease.<sup>2</sup>

§ 65. **Possession under lessee.**—The following instruction is correct and should have been given to the jury:

“The court instructs the jury, that the main question in this case to be determined is, whether the plaintiff was a sub-tenant of the premises, occupying the same under a lease from Breed, or whether she was occupying the same for Breed and under his lease from the defendant, Mrs. Miller. And if the jury find, from the evidence, that the alleged lease from Breed is only a pretense and, in fact, never had any existence, but that the plaintiff was occupying the premises with Breed, or for him and under his lease, then the law is for the defendants and the plaintiff cannot recover.”<sup>3</sup>

It can not be tolerated that a tenant who holds under written lease shall, by a secret arrangement, constitute another his sub-tenant and, after judgment is obtained against the lessee, such other shall insist that he is not bound by the judgment, as he was not a party to the proceedings. If the sub-tenant was alone in the occupancy of the premises, there might be some color for the claim that she should have been a party to the suit. But she was not: Breed occupied the premises with her.

<sup>1</sup> Casselberry v. Forquer, 27 Ill. 170.

<sup>2</sup> Reed v. Hawley, 45 Ill. 40.

<sup>3</sup> Miller et al. v. White, 80 Ill. 580.

They were his home and appellant had no knowledge of this alleged subletting.<sup>1</sup>

§ 66. **What complaint must show.**—To give justices jurisdiction, the plaintiff must state such facts as show that the relation of landlord and tenant existed, as well as a holding over after a demand made in writing by the landlord.<sup>2</sup>

To give the court jurisdiction, the petition should show that the defendants entered into the premises under a lease, or by the assent of the plaintiff, or some circumstance from which it can be presumed that the relation of landlord and tenant is shown to exist.<sup>3</sup>

If a sub-lessee holds over after the termination of the original lease, he is liable to eviction by an action of forcible detainer.<sup>4</sup>

§ 67. **Collusive possession.**—In an action of forcible entry and detainer by a landlord against his tenant after the termination of the lease, the holding over of the land is the foundation of the action and must necessarily be proved, like any other substantial fact.<sup>5</sup>

The action lies by a lessor against a sub-lessee holding over after the termination of the original lease.<sup>6</sup>

If the proprietor of land obtains possession by collusion with the tenant of another, the lessor will recover possession by forcible entry and detainer, whether he is entitled to retain such possession as against the proprietor,

<sup>1</sup> Miller et al. vs. White, 80 Ill. 580.

<sup>2</sup> Wells v. Hogan, 1 Ill. 337.

<sup>3</sup> Beel v. Pierce et al., 11 Ill. 92.

<sup>4</sup> Reed v. Hawley, 45 Ill. 40.

<sup>5</sup> Reed v. Grant, 4 Cal. 176.

<sup>6</sup> Reed v. Hawley, 45 Ill. 40.

or not. The possession obtained by collusion with the tenant only gives the proprietor the right to hold in the capacity of the person with whom he colluded.<sup>1</sup>

*Fifth—Against a Purchaser who Fails to Comply with the Contract of Purchase.*

§ 68. **The fifth statutory cause of action.**—The action will lie upon a vendee, having obtained possession under a written or verbal agreement to purchase lands or tenements and having failed to comply with his agreement, withholds possession thereof after demand in writing by the person entitled to such possession.

Where the vendor of real property brings forcible detainer against the purchaser to recover possession for non-compliance with the contract of sale, it will be sufficient to show that the defendant at the time the suit was brought was in possession by himself, or by others holding under him.<sup>2</sup>

§ 69. **Who may sue under this clause.**—Under this clause of the statute, the grantee of a vendor may sustain the action.<sup>3</sup>

In litigation arising under clause 5 of the statute, a purchaser having entered into the possession under a contract of purchase and failing to perform his contract is estopped from denying his vendor's right.<sup>4</sup>

The detention of the premises under this clause may

<sup>1</sup> McCarthy v. Hunt et al., 16 Ill. 76.

<sup>2</sup> Leshar v. Sherwin, 86 Ill. 420.

<sup>3</sup> Monsen v. Stevens, 56 Ill. 335.

<sup>4</sup> Leshar v. Sherwin, 86 Ill. 420.



be by the purchaser or by others under him; in either case it is ground for the action.<sup>1</sup>

But the relation of vendor and vendee must exist; the vendee must have obtained possession under a contract of purchase and his failure to comply with the contract must be before obtaining a deed to the premises to give the cause of action.<sup>2</sup>

Where a conveyance is made for the purpose of security and taking a bond back for re-conveyance of the premises, the grantee in such case is not liable as a vendee hereunder on default of payment, as such a conveyance is not a contract of purchase in the meaning of the statute.<sup>3</sup>

In order to give a justice jurisdiction in an action of forcible detainer, as between the vendor and vendee of land, under the act of 1861 the following elements must be shown by the complaint: *First*. The relation of vendor and vendee must exist. *Second*. The vendee must have obtained possession of the land under the contract. And then it is not sufficient that the vendee has at any time failed to comply with his contract, but he must have failed or refused to comply with it, before obtaining a deed of conveyance. If either of these elements is wanting, the justice acquires no jurisdiction.<sup>4</sup>

§ 70. What necessary to give jurisdiction.—In forcible detainer by the vendor of land against his vendee to recover possession, the written agreement to sell and the tender of a deed under the contract, are proper

<sup>1</sup> Leshar v. Sherwin, 86 Ill. 420.

<sup>2</sup> Haskins et al. v. Haskins, 67 Ill. 446.

<sup>3</sup> West v. Frederick, 62 Ill. 191.

<sup>4</sup> Haskins et al. v. Haskins, 67 Ill. 446.

evidence to show that defendant failed to comply with his contract.<sup>1</sup>

Where the defendant, entering into possession under a contract of purchase, fails to comply with such contract, he will be estopped from denying his vendor's right to possession in forcible detainer, and the plaintiff need not prove any prior possession in himself.<sup>2</sup>

Where the relation of parties is that of vendor and vendee and elements above stated are not shown, a proceeding for forcible entry and detainer will not be sustained.<sup>3</sup>

Under the act of 1861, the vendor of land may maintain an action of forcible entry and detainer against the vendee, where the latter has entered into possession of the premises under a contract of purchase, but before obtaining a deed of conveyance to the same, and fails and refuses to comply with the terms of the contract.<sup>4</sup>

In Illinois and some other States, the vendor can maintain this action against the vendee, where he has failed or refused to comply with the conditions of the contract under which he holds, or has forfeited it.<sup>5</sup>

Where a vendee, under a contract of purchase, has entered into possession, and, before obtaining a deed, refuses to comply with the contract and assigns his contract, or, without assigning the contract, puts another

<sup>1</sup> *Lesh v. Sherwin*, 86 Ill. 420.

<sup>2</sup> *Lesh v. Sherwin*, 86 Ill. 420.

<sup>3</sup> *Dixon v. Haley*, 16 Ill. 145.

<sup>4</sup> *Wilburn v. Haines*, 53 Ill. 207.

<sup>5</sup> *Monsen v. Stevens*, 56 Ill. 335; *Wilburn v. Haines*, 53 Ill. 207. *Williamson v. Paxton*, 18 Gratt. (Va.) 475; *Beard v. Bricker*, 2 Swan. (Tenn.) 50; *Sullivan v. Ivey*, 2 Sneed (Tenn.), 487.

party in possession, he himself abandoning the possession and refusing to comply with the contract, forcible entry and detainer can be maintained against the party in possession. He stands in the shoes of the vendee and is the vendee for all the purposes of this remedy.<sup>1</sup>

Where a party borrows money and conveys land to secure its re-payment with interest, and takes back a contract for the re-conveyance of the land upon payment, the relation of vendor and vendee will not exist between them and the party making the loan cannot maintain forcible detainer to recover possession upon default of payment by the party in possession.<sup>2</sup>

Where the landlord, before the end of the term, conveyed the premises by a deed absolute to another and an agreement was made at that time that the landlord should procure the possession for the grantee by a certain date, or forfeit \$75.00; held, that this did not amount to a reservation of any right to possession in the landlord and he could not maintain forcible detainer against the tenant. The principle governing this decision is, that even if such an agreement should be construed as a reservation of the right of possession, it would be inconsistent with the deed which carries the right of possession with it, and being at the same time, would be void.<sup>3</sup>

§ 71. **Growing crops.**—SEC. 4. In case of forfeiture under a contract of purchase, the purchaser shall be entitled to cultivate and gather crops, if any, planted by

<sup>1</sup> Jackson v. Warren, 32 Ill. 331.

<sup>2</sup> West v. Frederick, 62 Ill. 191.

<sup>3</sup> Purdy v. Rakestraw et al., 13 Ill. App. 480.

him and grown or growing on the premises at the time of the commencement of the suit, and shall have the right to enter for the purpose of removing such crops, first paying or tendering to the party entitled to the possession a reasonable compensation for such use of the land before removing such crops.<sup>1</sup>

*Sixth—Where the Premises Have Been Sold at Judicial Sale.*

§ 72. **The sixth cause of action.**—The action will lie when lands or tenements have been conveyed by any grantor in possession, or sold under the judgment or decree of any court in this State, or by virtue of any power of sale in any mortgage or deed of trust contained, and the grantor in possession, or party to such judgment or to such mortgage or deed of trust, after the expiration of the time of redemption is allowed by law, refuses or neglects to surrender possession thereof after demand in writing by the person entitled thereto, or his agent.

§ 73. **When right first given.**—The right of action under a judicial sale was given by the laws of 1861. The right of action by a purchaser at a sale made under the power given in the mortgage or trust-deed was first given under clause 6 of this statute in 1874. The right of action by a grantee against a grantor in possession was added by amendment in 1881.<sup>2</sup>

The title of a purchaser at a foreclosure sale seems to date from the execution of the mortgage; he is not bound by the mortgagor's lease executed after the mort-

<sup>1</sup> Rev. Stat. Ch. 57, sec. 4.

<sup>2</sup> See Rev. Stat. 1874, p. 535 and amendments thereafter.

gage, and he may eject the lessee of the mortgagor without notice.<sup>1</sup>

The action of forcible entry and detainer will lie against all persons bound by a decree, even though they may not be named in it.<sup>2</sup>

Where the defendant held possession and the plaintiff established his right of possession against the defendant in execution by proof of judgment, writ of sale and sheriff's deed, it is sufficient; but in case the party in possession is a stranger to the judgment, he must be shown to hold under the judgment debtor by a right acquired since the judgment lien attached, to enable him to sustain the action.<sup>3</sup>

The writ of possession issued upon a decree and the action of forcible entry and detainer seem to be concurrent remedies and both may be pursued until satisfaction is had by one remedy.<sup>4</sup>

A purchaser at a foreclosure sale, after the expiration of the time for redemption, may bring this action after demand of possession in writing.<sup>5</sup>

**§ 74. Detention of premises after sale.**—The remedy of forcible detainer, given by the statute in favor of a purchaser at a judicial sale, after the time of redemption has expired, is not restricted to the nominal party against whom the judgment is obtained, but may be employed against anyone who, either before or after the time of

<sup>1</sup> *Bartlett v. Hitchcock*, 10 Ill. App. 87.

<sup>2</sup> *Rice v. Brown*, 77 Ill. 549.

<sup>3</sup> *Nicholson et al. v. Walker et al.*, 4 Ill. App. 404.

<sup>4</sup> *Kessinger v. Whittaker et al.*, 82 Ill. 22.

<sup>5</sup> *Lehman v. Whittington*, 8 Ill. App. 374.

redemption has expired, obtains possession from the defendant in the judgment.<sup>1</sup>

**§ 75. Against whom suit brought.**—A purchaser at an execution sale must make a demand on the occupant before he can maintain forcible detainer.<sup>2</sup>

An action can be brought under the sixth clause of the second section of the forcible entry and detainer act only against a party to such judgment or decree.<sup>3</sup>

In an action under the statute, in forcible entry and detainer by the purchaser at the sheriff's sale, to obtain judgment of land against a party claiming ownership in fee, the question of title is put in issue.<sup>4</sup>

Although the question of title cannot arise on the trial of an action of forcible detainer, nevertheless the purchaser at a judicial sale cannot recover against the judgment debtor, or one succeeding to his rights and possession, unless he offers in evidence a valid judgment, execution and sheriff's deed. These are indispensable requisites to a recovery, because a sale of the land under the judgment and a failure to redeem must be shown.<sup>5</sup>

When a remedy by an action of forcible entry and detainer is sought under the second clause of the act of 1861, it is not restricted to the nominal party against whom the decree was rendered, but may be employed against any one who, even after the expiration of the time of redemption from the sale under the decree and

<sup>1</sup> *Kratz v. Buck*, 111 Ill. 40.

<sup>2</sup> *Dickason v. Dawson*, 85 Ill. 53.

<sup>3</sup> *Kingsbury v. Perkins et al.*, 15 Ill. App. 240.

<sup>4</sup> *Kepley v. Luke*, 10 Ill. App. 403.

<sup>5</sup> *Kratz v. Buck*, 111 Ill. 40.

after the execution and delivery of the master's deed to the purchaser, by collusion with the defendant in the decree, obtains and holds the possession of the premises without the knowledge or consent of the purchaser.<sup>1</sup>

§ 76. **Demand necessary.**—No action arises against a tenant for holding over until demand of possession has been made.

In this action the plaintiff must show that the possession of the defendant is wrongful as against him, and this he may do by proving that the defendant went into possession under the party to the trust deed, under which plaintiff claims after the lien attached to the land.

§ 77. **The proof necessary.**—To recover in an action of forcible entry and detainer, under the act of February 20, 1861, against one who remains in possession after his rights have been divested by judicial sale, the plaintiff must show a valid judgment, execution and deed.<sup>2</sup>

The plaintiff's right to possession, where the defendant in execution is defendant also in the action of forcible detainer, is fully established by the introduction in evidence of the judgment, execution and sale thereunder and sheriff's deed. But where the defendant in forcible detainer is a stranger to the judgment, it must be shown that the party in possession holds in subordination to the title or possession of the judgment rendered; that his title was acquired subsequent to the lien of the judgment. If his right was acquired prior to the judgment, a party leases the land for a term of years and the tenant

<sup>1</sup> Jackson v. Warren, 32 Ill. 331; Dudley et al. v. Lee, 39 Ill. 339; Preston et al. v. Zahl, 4 Ill. App. 423.

<sup>2</sup> Johnson v. Bantock, 38 Ill. 111.

takes possession. the purchaser under the execution cannot recover possession in an action of forcible detainer.<sup>1</sup>

A purchaser at a sheriff's sale cannot maintain an action of forcible detainer after receiving a deed, without first making demand for possession.<sup>2</sup>

Where a plaintiff fails to show any privity of estate between the defendant and the mortgagor and there is nothing to show by what right defendant is in possession, the case is not made out against him.<sup>3</sup>

A person in the quiet possession of mortgaged premises at the time of the commencement of the foreclosure suit, who is put out of possession by means of a writ of possession issued on a decree to which he was not a party, may maintain an action of forcible entry and detainer to restore him the possession from which he has been forcibly and unlawfully ousted.<sup>4</sup>

**§ 78. Judicial sales.**—In Illinois, the right of action is extended to purchasers at judicial sales.<sup>5</sup>

Where a tenant, after a sale of leased premises, attorns to the purchaser, but, after a judgment against him for the recovery of possession in favor of the original landlord, paid such landlord's attorney one month's rent and agreed to deposit all subsequent rents in the bank, this creates the relation of landlord and tenant between them.<sup>6</sup>

<sup>1</sup> Nicholson et al. v. Walker et al., 4 Ill. App. 404.

<sup>2</sup> Dickason v. Dawson, 85 Ill. 53.

<sup>3</sup> Preston et al. v. Zahl, 4 Ill. App. 423.

<sup>4</sup> Brush v. Fowler, 36 Ill. 53.

<sup>5</sup> Lehman v. Whittington, 8 Ill. App. 374; Rice v. Brown, 77 Ill. 549.

<sup>6</sup> Fisher v. Smith, 48 Ill. 184.



§ 79. **What steps necessary to recover under this clause.**—In an action of forcible entry and detainer, brought under the sixth clause of section 2, chapter 57. R. S., which provides that when lands have been sold under the judgment of any court and the party to such judgment or decree refuses, after the expiration of the time of redemption and after demand in writing, to surrender possession to the person entitled thereto, such person may recover the possession by an action of forcible entry and detainer. The person entitled to such suit is not required before commencing his suit to serve upon the person in possession a copy of the decree and produce and exhibit his deed, as in proceedings to procure a writ of assistance. In such cases the person entitled to possession is required only to comply with the statute—that is, to make a demand in writing before commencing his suit.<sup>1</sup>

<sup>1</sup> Brackensieck v. Vahle et al., 48 Ill. App. 312.

## CHAPTER V.

## WHO MAY MAINTAIN THE ACTION.

SECTION 80. The only issue to be tried.

81. What possession necessary.

82. Possession of timber lands.

83. Who the proper plaintiff.

84. Cases in illustration.

85. Growth of the action under the statutes.

86. Particular cases stated.

87. Right of exclusive possession requisite.

The question of title is not involved in the action of forcible entry and detainer, it being repeatedly held by the Supreme Court, that "the question of title is not in any sense involved in this action."<sup>1</sup>

§ 80. **The only issue to be tried.**—In this view, the possession and right of possession being the only questions to be settled, it necessarily follows, that only he who is entitled to the possession of the lands in dispute can maintain this action. The questions, therefore, to be tried are: Had plaintiff possession of the property in question? Has that possession been invaded by the defendant and wrongfully withheld after such entry? Or,

<sup>1</sup> Hardisty v. Glenn, 32 Ill. 62; Shoudy v. School Directors, etc., 32 Ill. 290; McCartney v. McMullen, 38 Ill. 237; Johnson et al. v. Baker, 38 Ill. 98; Smith v. Hoag, 45 Ill. 250; Hewitt v. Templeton et al., 48 Ill. 371; Smith v. Hollenback et al., 51 Ill. 223; Thompson v. Sornberger, 59 Ill. 326; Doty v. Burdick, 83 Ill. 473; Wheelan v. Fish, 2 Bradw. 447; Knight v. Knight et al., 3 Bradw. 206; Spurek v. Forsyth, 40 Ill. 438.

in case the entry was peaceable and rightful, such as that of a tenant, has such possession been unlawfully detained by the defendant?

The plaintiff, to recover in this action of forcible entry and detainer, must show that he has the right of possession of the premises upon which the forcible entry is said to have been made; the mere constructive possession, such as the fee simple title to the land entered upon draws to it, is not sufficient.<sup>1</sup>

These cases, however, will not apply in entries upon unoccupied lands under the late statute, in which cases actual possession is not necessary to maintain the action.

So also an entry upon the enclosed and cultivated portion, under a lease for the whole, and claiming the entire tract, is such a possession of the unenclosed portion of the land as will enable a party to maintain the action of forcible entry and detainer against any one who may forcibly enter on that portion.<sup>2</sup>

It was also held in the case of *McCartney v. McMullen*, 38 Ill. 237, that acts which indicate an assertion of ownership do not constitute such a possession as will support this action.

If the complaining party has actual possession with or without title, or such a claim to public lands as is recognized by our statutes, he can maintain the action against any one illegally or forcibly intruding upon such possession.<sup>3</sup>

Where the plaintiff, finding the premises vacant and

<sup>1</sup> *Thompson v. Sornberger*, 59 Ill. 326; *Smith v. Hollenback*, 51 Ill. 223; *McCartney v. McMullen*, 38 Ill. 237.

<sup>2</sup> *Hardisty v. Glenn*, 32 Ill. 62.

<sup>3</sup> *Whitaker et al. v. Gautier*, 3 Gilm. 443.

unoccupied, took peaceable possession of the same, claiming to be the owner, and the defendants procured the arrest of the plaintiff by a policeman without warrant, and, during her absence at the police station, took forcible possession of the premises and removed her goods, it was held a good cause of action against the parties under the forcible detainer act.<sup>1</sup>

In *Nicholson et al. v. Walker et al.*, 4 Bradw. 404, it is held by the Appellate Court, that the defendant may show the source of his claim to the right of possession; and in the case of *Kepley v. Luke*, 10 Bradw. 403, a forcible entry and detainer case, the same court holds that, under the facts in that case, the rights of the parties can not be determined without deciding which of them is the owner in fee. Yet the doctrine enunciated by decisions of the Supreme Court in *Kepley v. Luke*, 106 Ill. 395, and other cases heretofore cited, is the law on this point.

§ 81. What possession necessary.—The possession necessary on the part of the plaintiff to support this action is not a *pedis possessio*, as actual possession may exist by proof of something short of an actual residence on the land, or enclosing it by a fence.<sup>2</sup>

In *Davis v. Easley*, 13 Ill. 192, it is held that a party, having a deed for a tract of land covered with timber, and which has been used in support of the farm for an uninterrupted period of time, and from which he habitually takes firewood, rails and other materials, has such

<sup>1</sup> *Pratt v. Stone et al.*, 10 Bradw. 633.

<sup>2</sup> *Pearson v. Herr*, 53 Ill. 144; *Jamison v. Graham*, 57 Ill. 94; *Spurck v. Forsyth*, 40 Ill. 438.

an actual possession as will entitle him to maintain an action of replevin against a party who shall convert timber growing on such lands into boards.

§ 82. **Possession of timber lands.**—Actual possession of timber lands is defined and said to consist of such acts as the plaintiff repeatedly performed in regard to the tract of land. Nothing is clearer than that a fence is not indispensable to constitute possession of a tract of land; that it is nothing more than an act presumptive of an intention to assert an ownership and possession over the property. But there are many other acts equally evincive of such an intention—such as entering upon land and making improvements thereon, raising a crop, felling and selling the trees thereon, under color of title, etc.<sup>1</sup>

Thus, where a party claiming a vacant lot, enclosed the same, by building a fence so as to join with another fence and a brick wall, and thus keep out domestic animals, and inform all persons that the premises were appropriated, it was held, that this was a sufficient actual possession to maintain forcible entry and detainer against parties breaking down and destroying the fence in a forcible manner, under claim of ownership.<sup>2</sup>

But where a party has been in the possession of land for several years, and an adverse claimant enters and locks the barn and gate, plows and plants the same, which the other party does not acquiesce in, but resumes his possession, and leases the same to a tenant, the acts

<sup>1</sup> Brooks v. Bruyn, 18 Ill. 539; Pensoneau v. Bertke, 82 Ill. 161; Pearson v. Herr, 53 Ill. 150; Hassett v. Johnson, 48 Ill. 69.

<sup>2</sup> Allen v. Tobias et al., 77 Ill. 169.

of the adverse claimant will not be such a possession, unless justified by title, and demand of possession as will enable him to maintain forcible entry and detainer against the tenant.

Where it was objected by the defendant in an action of forcible entry and detainer, that he was in possession of only part of the premises, viz., the house and garden situated on the tract, it was held that where a defendant is thus in possession of the premises, the action will lie against him.<sup>1</sup>

Possession and exerting acts of ownership by a son, with whom the mother lived for twenty-eight years, constitutes such possession in the son as will enable him to maintain the action of forcible entry and detainer against an intruder.<sup>2</sup>

The action of forcible entry and detainer is maintainable only where the plaintiff seeks to obtain possession of real property.<sup>3</sup>

The action of forcible detainer can only be maintained by one who is entitled to possession.<sup>4</sup>

**§ 83. Who the proper plaintiff.**—Only the person entitled to the possession can make the complaint, he being the only party whose possession has been injured. A lawful possession must be averred.<sup>5</sup>

In general, the person who was deprived of, and who has the legal right of possession is the proper person to institute the proceedings, in whatever character or capac-

<sup>1</sup> Cox v. Cunningham, 77 Ill. 545.

<sup>2</sup> Rice v. Brown, 77 Ill. 549.

<sup>3</sup> Kassing et al. v. Keohane, 4 Ill. App. 460.

<sup>4</sup> Mueller v. Newell, 29 Ill. App. 192.

<sup>5</sup> McCartney v. McMullen, 38 Ill. 237.

ity this possession or right of possession may have been held.<sup>1</sup>

The devisee or grantee of a lessor, by express statute, may maintain an action of forcible detainer in his own name.<sup>2</sup>

The right of action in forcible entry and detainer vests at once in the person whose possession has been invaded, and this right must be exercised during his life in his own name.<sup>3</sup>

A party forcibly expelled from the premises of which he was in peaceable possession may maintain forcible entry, even if the expelling party had the right of entry.<sup>4</sup>

Whoever is in the actual possession of lands, claiming the fee, is presumed to have it, and may maintain an action for an invasion of his possession against anyone but him who has the legal right of possession.<sup>5</sup>

While it is of no importance whether the possession is by right or by wrong, nor whether the term of years be legal or not, yet a man who was neither in possession nor had title at the time the entry was made, cannot, by any subsequent purchase, acquire a right to institute this proceeding.<sup>6</sup>

The action will lie, where the proprietor of land obtains possession by collusion with the tenant of another

<sup>1</sup> Mann v. Brady, 67 Ill. 95; Rice v. Brown, 77 Ill. 549; Dudley et al. v. Lee, 39 Ill. 339.

<sup>2</sup> Thomasson v. Wilson, 146 Ill. 384.

<sup>3</sup> Dudley et al. v. Lee, 39 Ill. 339.

<sup>4</sup> Baker v. Hays, 28 Ill. 387.

<sup>5</sup> Brooks v. Bruyn, 18 Ill. 539.

<sup>6</sup> State v. Pierson, 2 N. H. 550; Gray v. Gray, 3 Litt. 465; Louis v. Stille, 2 Litt. 294.

to recover possession of the premises, and this is true, whether he is entitled to retain the possession, or not.<sup>1</sup>

§ 84. **Cases in illustration.**—One in peaceable possession, if forcibly expelled from the premises, may maintain the action.<sup>2</sup>

The landlord who becomes entitled to the possession of premises by the determination of a lease under an arrangement with his tenant, cannot maintain the action of forcible entry and detainer for an entry made while the tenant was in possession.<sup>3</sup>

A person who has been turned out of his possession by a writ issued by virtue of a decree to which he was in no sense a party, may proceed by action of forcible entry and detainer to recover the possession.<sup>4</sup>

It is held, that one joint tenant or tenant in common may maintain forcible entry and detainer against his co-tenant, but cannot recover the exclusive possession.<sup>5</sup>

One who is in possession of premises under an agreement to keep possession of them, together with articles of furniture, for the owner, has such an interest as will enable him to maintain an action for forcible entry and detainer.<sup>6</sup>

The house was occupied as a school-house by the consent of A., who claimed the right to the possession of the land on which it was situated; before the termination of the school, B. took possession of the house, declaring that

<sup>1</sup> *McCartney v. Hunt et al.*, 16 Ill. 76.

<sup>2</sup> *Baker v. Hays*, 28 Ill. 387.

<sup>3</sup> *Hays v. Porter*, 27 Tex. 92.

<sup>4</sup> *Laird v. Winters*, 27 Tex. 440.

<sup>5</sup> *Mason v. Finch*, 2 Ill. (1 Scam.) 495.

<sup>6</sup> *House v. Camp*, 32 Ala. 541.



if any person attempted to dispossess him he would shoot him. Held, that this was a forcible entry and detainer and that, if held after the termination of the school, it was a forcible detainer of the premises of A., for which the action will lie.<sup>1</sup>

**§ 85. Growth of the action under statutes.**—A conveyance *pendente lite* by the plaintiff in an action of forcible entry and detainer does not affect his right to recover, if at the commencement of the suit he was entitled to the possession; and the same result attends in change of possession.<sup>2</sup>

A bird's eye view of the growth of the action in Illinois can be obtained from the rulings of the Supreme Court on the various statutes, the scope of the action being enlarged by the successive acts of the Legislature from being applicable to two cases originally to now applying to six distinct cases enumerated by our latest statutes.

To maintain the action of forcible entry and detainer under the statute, two things must concur:

1. The possession must be illegally or forcibly taken, which constitutes the entry.

2. The possession must be withheld, which constitutes the detainer.<sup>3</sup>

The statute provides for three cases in which forcible entry and detainer may be maintained:

1. A wrongful entry, as contradistinguished from a violent one.

<sup>1</sup> Van Hook v. Story, 4 Humphries (Tenn.), 59.

<sup>2</sup> Daggitt v. Mensch et al., 41 Ill. App. 403.

<sup>3</sup> Robinson v. Crummer, 5 Gilman (Ill.), 218.

2. A forcible entry, with actual force.

3. A wrongful holding over.<sup>1</sup>

Under the Revised Statutes of Illinois, 1845, forcible entry or forcible detainer could be maintained in three cases only: *First*. Where there was a wrongful or illegal entry, as contradistinguished from a forcible and violent entry. *Second*. Where the entry is forcible by means of actual violence. *Third*. Where a tenant wrongfully holds over after the expiration of the time for which the premises have been let to him.<sup>2</sup>

There are four cases in which forcible entry and detainer may be maintained in this State. *First*. Where there has been a wrongful or illegal entry upon the possession of another. *Second*. Where there has been a forcible entry upon such possession. *Third*. Where any person may be settled upon the public lands within this State when the same have not been sold by the general government; and *Fourth*. When there has been a wrongful holding over by a tenant after the expiration of the time for which the premises may have been let to him.<sup>3</sup>

The act of 1861 (session laws, p. 176) brings within the reach of this action two additional cases: *First*. Where a vendee under a contract to purchase has entered into possession and, before obtaining a deed, refuses to comply with the contract; and *second*: where lands have been sold under a judgment or decree and the party to such judgment or decree, after the expiration of the time of redemption, refuses, after demand in writing by the

<sup>1</sup> Atkinson v. Lester et al., 2 Ill. 407.

<sup>2</sup> Jackson v. Warren, 32 Ill. 331.

<sup>3</sup> Whitaker et al. v. Gautier, 3 Gilman (Ill.), 443.

purchaser under the same, to surrender possession thereof.<sup>1</sup>

One in the lawful possession of property, as a tenant by sufferance, or otherwise, has a right of action against all persons entering against his will, or by force.<sup>2</sup>

§ 86. **Particular cases stated.**—The owner of certain premises having leased them to A., who went into possession, upon the expiration of such lease let the premises by a verbal lease to B., who, with the consent of A., took possession and proceeded to cultivate the land. A., however, subsequently refused to quit the premises. In this case the landlord, having parted with his right to the possession, could not maintain forcible detainer against A. to recover the premises; the verbal lease was a legal and binding letting of the premises and entitled B. to the possession, which he actually obtained with the assent of A., and he alone could bring the action.<sup>3</sup>

Where a tenant is in the lawful possession of the premises, either as tenant by sufferance or otherwise, an entry made against his will or by force is unlawful and the action of forcible entry and detainer will lie.<sup>4</sup>

Thus, where a sub-tenant quit and delivered the key to the tenant, who was about to move into the house when the sub-tenant borrowed the key and gave it to the landlord, who thereupon took possession, it was held, that the tenant could maintain forcible detainer against the landlord.<sup>5</sup>

<sup>1</sup> Jackson v. Warren, 32 Ill. 331.

<sup>2</sup> Knight v. Knight et al., 3 Ill. App. 206.

<sup>3</sup> Gradle v. Warner, 140 Ill. 123.

<sup>4</sup> Knight v. Knight et al., 3 Ill. App. 206.

<sup>5</sup> Haupt v. Pittaluga, 6 Bush. 493.

The action may be maintained by a tenant at will, by executors and administrators, by receivers and generally by any person whose possession or right of possession has been unlawfully invaded.<sup>1</sup>

If the right of immediate possession is in the tenant, the action of forcible entry and detainer must be brought by him.<sup>2</sup>

The party entitled to the possession of property having abandoned it by allowing fences to be removed without repair or keeping them up, this state of case showed an abandonment of the premises as strongly as it did a retention thereof, and the action of forcible entry and detainer could not be sustained.<sup>3</sup>

**§ 87. Right of exclusive possession requisite.**—The plaintiff is not entitled to recover in an action of forcible entry and detainer, unless he has the right of exclusive possession. To maintain the action of forcible entry and detainer, it is not necessary that the plaintiff should have a *pedis possessio*; it is sufficient if the premises are used and occupied for some useful purpose; but if such possession is joint, as to different persons, neither one would be entitled to the exclusive possession.<sup>4</sup>

The right of action rests alone in the party entitled to the possession, and if the landlord has alienated the reversion during the continuance of the lease, then his alienee is entitled to the possession at its termination and

<sup>1</sup> Commonwealth v. Biglow, 3 Pick. (Mass.) 31; Jones v. Shay, 60 Cal. 508; Beezley v. Burgett, 15 Ia. 192; Rice v. Brown, 77 Ill. 549; Spear v. Lomax, 42 Ala. 516; Baker v. Cooper, 51 Me. 388.

<sup>2</sup> Thomasson v. Wilson, 146 Ill. 384.

<sup>3</sup> Hassett v. Johnson, 48 Ill. 68.

<sup>4</sup> Jamison v. Graham, 57 Ill. 94.

must make the demand therefor and bring the action to recover the possession. Where A. executes a lease to B., to take effect after a former tenancy had expired, B. was entitled to the possession of the premises upon the expiration of the former lease and must bring suit for their possession.<sup>1</sup>

The lessee under a new lease may re-claim possession of such premises and put the old tenant out.<sup>2</sup>

<sup>1</sup> Ball v. Chadwick et al., '46 Ill. 28.

<sup>2</sup> Webb v. Heyman, 40 Ill. App. 335.

## CHAPTER VI.

## AGAINST WHOM THE ACTION WILL LIE.

SECTION 88. The general rule.

89. What persons included as defendants.

90. When action will not lie.

91. Joint occupants—joint tenants.

§ 88. **The general rule.**—As a general rule, the person in actual possession of the premises detained, at the time of the commencement of the action, is the one against whom it should be brought. The right is not confined to the disseisor, but may be maintained against his representatives and all those in possession under him.<sup>1</sup>

A landlord, upon the termination of the tenancy, has the right to maintain forcible detainer against the tenant or any person in possession by, through or under him, who may hold over.<sup>2</sup>

Where the entry into lands and tenements was made by a party who did not participate in the act, but such act was done by others under his direction or by his procurement, the action would lie against him.<sup>3</sup>

The owner of real estate which is in the peaceable possession and occupancy of another, though without right, cannot enter by force against the will of the tenant and expel him without rendering himself liable as a trespasser.<sup>4</sup>

<sup>1</sup> Jackson v. Warren, 32 Ill. 331; People v. McAdam, 84 N. Y. 287.

<sup>2</sup> Thomasson v. Wilson, 146 Ill. 384.

<sup>3</sup> Minturn v. Burr, 20 Cal. 48.

<sup>4</sup> Westcott v. Arbuckle et al., 12 Ill. App. 577.

Where the person in actual possession of land is a sub-tenant, he occupies the place of the tenant and is liable to the action.<sup>1</sup>

Where a tenant has entered into the possession of premises peaceably and in good faith under one who has previously made a forcible entry, not being privy to the wrongful act of the grantor or having any knowledge of it, he is not liable to be turned out by an action of forcible entry and detainer.<sup>2</sup>

§ 89. **What persons included as defendants.**—In case of a tenant holding over against his landlord, either the tenant or any person claiming under him is liable to this action.<sup>3</sup>

Where a tenant in peaceable possession of land under an unexpired lease, is forcibly dispossessed by a constable under a writ of restitution for different premises, the tenant, after demand made in writing, may regain possession by the action of forcible entry and detainer. The writ of possession for another and different premises could not be pleaded in evidence in justification of the eviction.<sup>4</sup>

Where a tenant continues in possession after notice imposing new terms, such holding over after the expiration of his term in no wise changes the relation of the parties, and an action will lie for use and occupation upon the new terms.<sup>4</sup>

§ 90. **Where the action will not lie.**—The question

<sup>1</sup> Reed v. Hawley, 45 Ill. 40; Bird v. Fannon, 3 Head (Tenn.), 12.

<sup>2</sup> Clark v. Barker, 44 Ill. 349.

<sup>3</sup> Hubner v. Feige, 90 Ill. 208.

<sup>4</sup> Higgins v. Halligan, 46 Ill. 173.

of forcible entry and detainer will not lie to recover an incorporeal right, upon which no forcible entry can in fact be made. For example: the action will not lie for forcibly taking possession of a ferry, with the adjacent banks and shores of the river, as the ferry is an incorporeal right, upon which no entry can in fact be made; nor can a sheriff, under a judgment of restitution, deliver possession of a ferry.<sup>1</sup>

Nor does the action lie for forcibly entering upon a weir, because that is personal property.<sup>2</sup>

Personal property cannot be recovered in an action of forcible entry and detainer.<sup>3</sup>

In unlawful detainer by the husband's vendor to recover possession of premises contracted for in his name, but as trustee for his wife, she is not a necessary party.<sup>4</sup>

A party cannot divide an entire demand, so as to maintain several actions for its recovery.<sup>5</sup>

Courts of law will not take cognizance of separate causes of action against different parties in the same suit.<sup>6</sup>

An action of forcible entry and detainer cannot be maintained against two or more who hold in severalty.<sup>7</sup>

Where different tenants have successively paid rent to the wrong party, after notice, it is improper to enter a decree requiring all of these tenants and the person to whom they paid the rent to pay the whole amount, so

<sup>1</sup> Rees v. Lawless, 6 Litt. 184.

<sup>2</sup> Van Arken v. Decker, — Paine, 108.

<sup>3</sup> Hoffman v. Reichert et al., 31 Ill. App. 558.

<sup>4</sup> Williamson v. Paxton, 18 Gratt. (Va.) 475.

<sup>5</sup> LaSalle Co. Mfg. Co. v. The City of Ottawa, 16 Ill. 418.

<sup>6</sup> Casselberry v. Forquer, 27 Ill. 170.

<sup>7</sup> Reynolds v. Thomas et al., 17 Ill. 207.



wrongfully paid, to the party entitled to it. The party receiving the rent is liable for the whole amount received, but each tenant is only liable for the amount which accrued during his tenancy.<sup>1</sup>

The Illinois statute is more comprehensive than the English act in this, that it authorizes an action against a lessee who holds over after the termination of his lease, whether he holds by force or not, provided the lessor has given him notice to quit.<sup>2</sup>

If the plaintiff has leased the premises to the tenant, who is in actual possession at the time of a forcible entry thereon by another, the plaintiff cannot maintain the action, because not entitled to the possession.<sup>3</sup>

The action for unlawful detainer of demised premises will not lie against a claimant not in possession.<sup>4</sup>

An action for unlawful detainer of demised premises will lie against a city.<sup>5</sup>

§ 91. **Joint occupants—Joint tenants.**—If the occupation of premises was joint, as to different persons, neither one would be entitled to the exclusive possession. It was held in *Mason v. Finch*, 1 Scammon 495, that a joint tenant should be entitled to the benefit of this act, but it seems that a joint tenant cannot recover the *exclusive* possession and would only be entitled to a judgment for "an undivided interest." The Supreme Court again says, that "it is contended, in argument, that one joint tenant, who unlawfully and forcibly excludes his co-

<sup>1</sup> Davenport et al. v. Haynie et al., 30 Ill. 59.

<sup>2</sup> Mason v. Finch, 2 Ill. 495.

<sup>3</sup> Mann v. Brady, 67 Ill. 95; Yoder v. Earley, 2 Dana (Ky.), 245.

<sup>4</sup> Preston v. Kehoe, 10 Cal. 445.

<sup>5</sup> Rains v. Oshkosh, 14 Wis. 372.

tenant, is liable in this action. This principle, if correct, is not involved in this case. Appellee seeks to recover the entire premises. He claims the use of the whole, and not a part of the pasture. If the parties had a joint right, this would be inconsistent with the exclusive use, by either, without an agreement between them. It would be absurd to hold that one joint tenant can deprive his co-tenant of all participation in a common right."<sup>1</sup>

<sup>1</sup> Jamison v. Graham, 57 Pl. 94.

## CHAPTER VII.

## POSSESSION.

SECTION 92. The kind of possession necessary for plaintiff.

93. *Pedis possessio* unnecessary.

94. Constructive possession.

95. Extent of possession.

96. Judgment for part only.

97. The demand of possession.

98. Demand in writing.

99. The service of demand.

§ 92. The kind of possession necessary for plaintiff.

—Where the plaintiff in an action of forcible entry is in the *bona fide*, peaceable possession of a coal mine in his own right, and while so in possession the defendant approaches the plaintiff's employes and induces them to surrender possession to him, his possession thus acquired is unlawful and can not be maintained.<sup>1</sup>

In order to recover in an action of forcible entry and detainer, the plaintiff must prove actual and peaceable possession of the premises by him at the time of the alleged forcible entry.<sup>2</sup>

To sustain an action of forcible entry and detainer, the plaintiff must show that he had actual possession of the premises. The mere constructive entry, such as the fee simple title draws to it, is not sufficient.<sup>3</sup>

It does not require the actual *pedis possessio* to support

<sup>1</sup> Hoffman v. Reichert et al., 147 Ill. 274.

<sup>2</sup> Mann v. Brady, 67 Ill. 95.

<sup>3</sup> McCartney v. McMullen, 38 Ill. 237.

the action of forcible entry and detainer. Actual possession may exist, as in the case of a wood-lot, unenclosed but used as an adjunct to a farm from which the latter is supplied with timber, wood and rails.<sup>1</sup>

The plaintiff, to recover in an action of forcible entry and detainer, must show that he had, at the time of the alleged entry, the actual possession of the premises: a mere constructive possession is not sufficient.<sup>2</sup>

A person may have had possession of property constructively, while he was never, in fact, on the land, and whether he had such possession or not is always a question for the jury.<sup>3</sup>

In *Spurck v. Forsyth*, 40 Ill. 438, it was held a sufficient actual possession that the plaintiff, while he did not reside on the premises, owned and improved them and that they furnished "visible tokens of occupancy, such as fences, buildings and cultivation;" showing the actual possession of part of the premises, with the claim on the whole, if the claim is reasonable and *bona fide*.<sup>4</sup>

Keeping goods on the premises was held sufficient.<sup>5</sup>

The possession necessary in the plaintiff to support the action of forcible entry and detainer must be *bona fide*. Where an occupant was driven from his home by high water and returned when permitted to do so, such temporary absence would not destroy his possession. On the other hand, a party attempting to get possession by going

<sup>1</sup> *Pearson v. Herr*, 53 Ill. 144.

<sup>2</sup> *Thompson v. Sornberger*, 59 Ill. 326.

<sup>3</sup> *Carson et al. v. Crigler*, 9 Ill. App. 83.

<sup>4</sup> *Hardisty v. Glenn*, 32 Ill. 62.

<sup>5</sup> *Wall v. Goodenough*, 16 Ill. 415; *Baker v. Hays*, 28 Ill. 387.

on the land, plowing one-half day and then departing, did not have sufficient possession.<sup>1</sup>

The delivery of a key of a house to a person other than the landlord, or his heir, will not transfer a right of possession to such person, unless he has acquired the interest of the landlord or his heirs.<sup>2</sup>

Where a director and treasurer of a mining corporation takes possession of the mine, his possession will be that of the company; and if the corporation obtains possession through other officers, he can not maintain forcible entry and detainer against the corporation, although he may have become the purchaser of the mine under a sheriff's sale, if the time for redemption has not expired.<sup>3</sup>

§ 93. *Pedis possessio unnecessary.*—The legal title or fee draws to it the legal possession of land, but where a *pedis possessio* is relied on, it must be open, exclusive and public. The acts indicating possession must be such as men generally employ in the enjoyment of property, and these acts should be continuous, not merely occasional.<sup>4</sup>

Possession continued for a period of over twenty years, of a part of a tract of land, and the exercise of acts of ownership over the residue, under claim of title to the whole, constitutes such a possession as will authorize the possessor to maintain the appropriate action against a stranger who interferes with his possession or injures the inheritance.<sup>5</sup>

<sup>1</sup> McHan v. Stansell, 39 Ga. 197; DeGraw v. Prior, 60 Mo. 56.

<sup>2</sup> Doty v. Burdick, 83 Ill. 473.

<sup>3</sup> Hoffman v. Reichert et al., 147 Ill. 274.

<sup>4</sup> Hassett v. Johnson, 48 Ill. 68.

<sup>5</sup> Fairman v. Beal, 14 Ill. 244.

Where a tenant vacates the premises and the landlord has possession by placing goods therein, he may maintain a proceeding for forcible entry against an intruder without making a formal re-entry.<sup>1</sup>

§ 94. **Constructive possession.**—Where the owner of premises had leased them for one year and, at the expiration of the term, went to the farm and carried there a load of goods, and the tenant carried them upstairs into a room and stated that he rendered up possession, and the landlord performed some acts preparatory to occupying the house and left with the intention of returning on the following Monday, and had a deed for the whole premises, it was held, that this showed a sufficient possession of the premises to enable the landlord to maintain forcible entry and detainer against one taking possession before his return.<sup>2</sup>

A party having purchased a piece of wood-land, entered upon it, built a log-cabin, made rails and then left it for a temporary purpose and was absent two weeks, leaving his tools in the cabin, intending to move into it in a short time. During his absence, a second party, who had rented the same land from another claimant, went on to the land, completed the cabin, built a fence around it, made a door to the house, placed some articles of his own into it, locked the door and went away. The first party, on his return, finding the place as the second party had left it, went into the house and held possession, whereupon the second party brought an action of forcible entry and detainer against him. In

<sup>1</sup> Wall v. Goodenough, 16 Ill. 415.

<sup>2</sup> Huftalin v. Misner, 70 Ill. 205.

this case it was held, that the defendant's acts did not show an abandonment of the possession; that his possession continued during his two weeks' absence and was such a possession as to entitle him to hold the premises in law, the acts of the second party being trespasses.<sup>1</sup>

Any use of the premises which shows an intention to hold possession for the purpose of cultivation, improvement or applying them to the uses for which they may be fitted, is sufficient.<sup>2</sup>

In California it has been held, that a constructive and scrambling possession is not sufficient.<sup>3</sup>

**§ 95. The extent of possession.**—The defendant in an action of forcible detainer for a tract of land cannot defeat the same by proof that he was in possession of only the house and garden situated on the tract.<sup>4</sup>

Where a lease of a building does not in terms convey any right to a passage way to buildings in the rear of that leased, or any right to such buildings in the rear, the most that can be claimed is, that the lease conveys so much of the lot on which the building stands as may be necessary to the complete enjoyment of the leased building for the purpose for which it is rented.<sup>5</sup>

The possession of a farm draws to it the possession of the wood-land belonging to it, though not enclosed, especially if repeated and unchallenged acts of ownership are shown.<sup>6</sup>

<sup>1</sup> *Haley v. Palmer*, 9 Dana (Ky.), 320.

<sup>2</sup> *Bradley v. West*, 60 Mo. 59.

<sup>3</sup> *Vall v. Butler*, 49 Cal. 74.

<sup>4</sup> *Rice v. Brown*, 77 Ill. 549.

<sup>5</sup> *Patterson et al. v. Graham*, 140 Ill. 531.

<sup>6</sup> *Pearson v. Herr*, 53 Ill. 144.

A lessee of land bordering on a stream, not navigable, at common law is entitled to the accretions thereto caused by the receding of the stream, or a change in its current, during his term, even though the bank of the stream is named as boundary of the demised premises.<sup>1</sup>

It was formerly the law, that the possession, so far as extent was concerned, must be proved as alleged in the complaint. (*Thompson v. Sornberger*, 59 Ill. 326); that is, suit could not be brought for a certain tract of land described in the complaint, and possession recovered of any other property than that described. A party could not sue for one thing and recover another. Pleadings must be reasonably full and accurate.

Thus, where the plaintiff claimed the possession of the entire house, she could not recover possession, as a tenant in common, of either the whole or a part; the court saying: "To permit such a recovery would violate the plainest and most simple rule of pleading evidence and practice. How can it be said that, because she has shown that she occupied the greater portion of the house in common with Rich, by his permission, she had, therefore, the right to the sole and exclusive possession of all of that portion? Such a variance is too broad and palpable to be disregarded."

**§ 96. Judgment for part only.**—"Nor is the averment, that the plaintiff was in the sole and exclusive possession of a house, sustained by proof that she was so possessed of but two of a number of rooms in the house; such evidence does not tend to sustain the averment in the plaint. It establishes a different case from that made

<sup>1</sup> *Cobb v. Lavalley*, 89 Ill. 331.



in the pleadings, and so far different that the court, on being asked, should have excluded it from the consideration of the jury;<sup>1</sup> but the statute of Illinois now provides, "If it shall appear that the plaintiff is entitled to only a part of the premises claimed, the judgment and execution shall be for that part only and for costs, and for the residue the defendant shall be found not guilty."

**§ 97. The demand of possession—Return—Form.—**

SEC. 3. The demand required by the preceding section may be made by delivering a copy thereof to the tenant, or by leaving such a copy with some person above the age of twelve years, residing on or being in charge of the premises; or in case no one is in actual possession of the premises, then by posting the same on the premises. When any such demand is made by an officer authorized to serve process, his return shall be *prima facie* evidence of the facts therein stated, and if such demand is made by any person not an officer, the return may be sworn to by the person serving the same and shall then be *prima facie* evidence of the facts therein stated. Which demand for possession may be in the following form:

"To -----:

I hereby demand immediate possession of the following described premises:" (Describing the same.)

Which demand shall be signed by the person claiming such possession, his attorney or agent.

Besides notice to terminate the tenancy, another notice or a demand for possession is required, which is distinct and different from the former notice. The notice

<sup>1</sup>Smith v. Killeck, 5 Gilm. 293; Dunne v. The Trustees, etc., 39 Ill. 578.

should show clearly, who claims to be entitled to the possession of the premises and who makes the demand, and it should be made by the person for whose use the premises are demanded, or by his duly authorized agent or attorney.<sup>1</sup>

§ 98. **Demand in writing.**—A demand in writing is a condition-precedent of plaintiff's right to recover in an action of forcible entry and detainer.<sup>2</sup>

In forcible detainer, a party claiming the possession must show not only, that he is entitled to possession, but that the defendant unlawfully withholds such possession after demand made; and where the plaintiff claimed possession under a foreclosure sale, it was held that a demand should have been made upon the husband and wife, who were both parties to the foreclosure proceeding and were both in possession of the premises.<sup>3</sup>

A demand in writing for possession is essential to the recovery of penalty of double rent for willfully holding over after the expiration of the term.<sup>4</sup>

It is essential that the demand should be shown to be genuine, either signed by the person entitled to possession or some one authorized by him, or at least recognized by him.<sup>5</sup>

Demand for possession for the purposes of a suit of forcible entry and detainer should be made after the expiration of the lease.<sup>6</sup>

<sup>1</sup> *Doran v. Gillespie*, 54 Ill. 366; *Post v. Bohner*, 36 N. W. Rep. (Neb.) 208; *Dimmett v. Appleton*, 20 Neb. 208.

<sup>2</sup> *Lehman v. Whittington*, 8 Ill. App. 374.

<sup>3</sup> *Wheelan v. Fish*, 2 Ill. App. 447.

<sup>4</sup> *Belles v. Anderson*, 38 Ill. App. 128.

<sup>5</sup> *Ball v. Peck*, 43 Ill. 482.

<sup>6</sup> *Prickett v. Ritter*, 16 Ill. 96.

A demand in writing for possession, to be made upon the tenant, to authorize an action of forcible detainer against him, should be made after the termination of the time for which the premises were let; a demand before that time would not avail.<sup>1</sup>

In a forcible entry and detainer suit the plaintiff testified, that he served the demand for possession of the premises on the defendant on a given day, which was the same day suit was brought. Held, that this proof was sufficient to sustain the finding of service before the suit was brought, if any demand was necessary.

The statute relating to forcible entry and detainer, and which requires a demand in writing for possession, does not require the demand to be made within a reasonable time or any definite time before the commencement of the suit.<sup>2</sup>

**§ 99. The service of demand.**—This demand for possession should be made after the determination of the time for which the premises were let; a demand made before that time will not avail.

There must be proof of service of a written demand made before the commencement of the suit. No presumption of its being served arises from the fact of its being admitted in evidence.

A demand of possession by the landlord which is served by his agent, where the demand itself discloses the fact of the agency of the person serving the same, is sufficient.

The demand for possession must be made or served by

<sup>1</sup> *Doran v. Gillespie*, 54 Ill. 366.

<sup>2</sup> *Huhtalin v. Misner*, 70 Ill. 205; *Doran v. Gillespie*, 54 Ill. 366; *Lehman v. Whittington*, 8 Ill. App. 374; *Nixon v. Noble*, 70 Ill. 32; *Vennum v. Vennum*, 56 Ill. 430.

the plaintiff or by some person authorized by him to serve it.

The supreme court held, in 1867, that "the service of the demand" is a fact which must be established, in the usual mode of making proof, clearly, according to the rules of evidence. The witness making the service should be called. Officers, only, are authorized to make return of service of process, unless it be in a few cases where the law authorized private individuals to make a sworn return. The person who served the notice should have been called to prove that fact. See § 107.<sup>1</sup>

In an action of forcible detainer by a purchaser under a foreclosure sale, the plaintiff must prove not only a demand for possession, but also that the defendant neglected or refused to surrender possession after such demand.<sup>2</sup>

Before the mortgagees can maintain replevin to recover the possession of goods or trover for their value, they must have demanded possession of the same before bringing the suit, and this demand must be properly proven.<sup>3</sup>

<sup>1</sup> Ball v. Peck, 43 Ill. 482.

<sup>2</sup> Hersey et al. v. Westover, 11 Ill. App. 197.

<sup>3</sup> Holliday et al. v. Bartholomæ et al., 11 Ill. App. 206; Simons v. Jenkins, 76 Ill. 479; Rev. Stat., ch. 80, §§ 10, 11.

## CHAPTER VIII.

TERMINATION OF THE TENANCY AND HEREIN OF NOTICE  
TO QUIT AND DEMAND.

## SECTION 100. Possession of tenants.

101. Notice—How signed.
102. Notice—How served.
103. Agency—How proven.
104. Parol leasing for more than one year.
105. Delivery of key and the acceptance of premises.
106. Statutes of 1865 construed.
107. How demand should be made.
108. Yearly tenancy—Notice.
109. When demand made.
110. When lease expires.

§ 100. **Possession of tenants.**—Tenants obtain possession by virtue of a lease, and can remain in possession, lawfully, only during the continuance of that lease.

Leases expire by their own limitation, or they may be forfeited in various ways particularly set forth in the lease, and may also be forfeited in other ways, such as attorning to a stranger, denying the title of the landlord, etc.

Where a lease expires by its own limitation, the tenancy is *ipso facto* ended, and the right of possession reverts instantaneously to the landlord; and in this case no notice to quit is necessary, because all parties to the lease have full notice of its provisions.<sup>1</sup>

But where a landlord elects to terminate the lease for

<sup>1</sup> Rev. Stat., ch. 80, sec. 12.

a breach of covenants, he must give the tenant notice.<sup>1</sup>

And where the tenancy is for an indefinite period, a reasonable notice to quit is necessary to terminate the tenancy. And it seems, that where a notice is required, it must be given a due length of time before the expiration of the tenancy, and terminate with a regular period in the tenancy, that is, at the end of a year, quarter or month, according to the party's right to terminate it by notice. Where default is made in the terms of the lease, the statute definitely fixes the time that notice is required to be given to terminate the tenancy.

The Revised Statutes, chap. 80, sec. 9, provides as follows :

“ When default is made in any of the terms of the lease, it shall not be necessary to give more than ten days' notice to quit, or of the termination of such tenancy, and the same may be terminated on giving such notice to quit at any time after such default in any of the terms of the lease, and no other notice or demand of possession or termination shall be necessary.”

And in case of a tenancy from year to year, the same statute, sec. 5, provides : “ In all cases of tenancy from year to year, sixty days' notice in writing shall be sufficient to terminate the tenancy at the end of the year, the notice to be given any time within four months preceding the last sixty days of the year.”

In case of tenancy by the month, it is provided by statute that, “ in all cases of tenancy by the month, or for any other term less than one year, where the tenant holds over without any special agreement, the landlord

<sup>1</sup> Ball v. Peck, 43 Ill. 482; Rev. Stat., chap. 80, sec. 9.

shall have the right to terminate the tenancy by thirty days' notice in writing, and to maintain the action of forcible entry and detainer or ejectment."<sup>1</sup>

Where premises were demised by parol for one year at a stipulated rent, payable monthly, and the tenants paid the rent as it accrued, up to November, 1870, the lease being void by force of the statute of frauds, they became tenants from month to month, and were entitled to a month's notice to quit."

*The Demand and Notice to Quit.*

In *Ballance et al. v. Fortier et al.*, 3 Gilm. 294, it appears that a demand for possession made in general terms is sufficient. It must be a demand in writing for the possession of the premises, describing them with certainty. And where a party was notified "to quit and deliver up possession," it was held sufficient, the court saying: "The demand contains more than is necessary, but this will not vitiate. It requires the party in possession 'to quit and deliver up possession.' This is a full compliance with the statute, which requires a demand in writing."<sup>2</sup>

§ 101. **Notice—How signed.**—This notice to quit should be signed by the landlord or his agent, and, if signed by the agent, the notice must discover the agency, which must afterward be proved on the trial. Where a notice says, "John Doe by Joseph Smith, his authorized

<sup>1</sup> Rev. Stat., chap. 80, sec. 6.

<sup>2</sup> Arch. Landlord and Tenant, 66; 4 Kent's Comm. 111, 112; 24 Maine, 287; 11 Wend. 610; Prickett v. Ritter, 16 Ill. 97.

<sup>3</sup> Vennum v. Vennum, 56 Ill. 434.

agent, hereby demands," etc., and then is signed, "John Doe by Joseph Smith, his agent," it is sufficient.

So a demand of possession, which is served by the landlord's agent, and which demand itself discloses the fact of the agency of the person serving the same, is sufficient.<sup>1</sup>

A copy of the notice to quit should be left with the occupant. A demand by reading to the tenant is not a demand in writing; the statute contemplates a written demand which the tenant can examine.<sup>2</sup>

It is sufficient service of a notice to quit, if a copy thereof is delivered to the wife of the tenant.<sup>3</sup>

A return, that there was no one in actual possession and the fact that notice was posted on the premises, being shown by affidavit, constitute compliance with sec. 10, chap. 80, Revised Statutes.<sup>4</sup>

It was never intended by the statute to enable a landlord, in case his tenant was temporarily from home, to leave a notice on the premises and turn his family into the streets in his absence. In 24 Ill. p. 192, the court held, that reading the notice to the tenant was not sufficient.<sup>5</sup>

§ 102. **How notice served.**—A copy of a notice to quit should be left with the occupant. Reading the same to defendant is insufficient.<sup>6</sup>

<sup>1</sup> Ball v. Peck, 43 Ill. 482; Nixon v. Noble, 70 Ill. 32.

<sup>2</sup> Seem v. McLees, 24 Ill. 192; Lehman v. Whittington, 8 Bradw 374.

<sup>3</sup> Bell v. Bruhn, 30 Ill. App. 300.

<sup>4</sup> Consolidated Coal Co. of St. Louis v. Schaefer, 31 Ill. App. 364

<sup>5</sup> Doran v. Gillespie, 54 Ill. 366.

<sup>6</sup> Seem v. McLees, 24 Ill. 192.



A notice by a landlord to terminate the tenancy for a breach of certain conditions in the lease may be served by posting a copy thereof upon the door of a building on the demised premises when the tenant has abandoned the actual possession, and the fact that the notice may speak of the premises as "the premises now occupied by you," will not void the notice.<sup>1</sup>

A notice to quit, signed "Cyrus M. Hawley, by Wm. C. Proudly, an authorized agent," is substantially good, but should have been "*his* authorized agent."<sup>2</sup>

The act of 1861, prescribing what notice shall be given a tenant in order to terminate the lease, has reference only to cases where a tenant holds over after his term is ended and does not contemplate a tenancy at will.<sup>3</sup>

The common law required a half year's notice to terminate a tenancy from year to year.<sup>4</sup>

Under the act of 1861, all tenancies less than one year and greater than one month, and a tenancy by the month, require thirty days' notice to terminate them. Thirty days' notice to terminate tenancies less than one month is not required.<sup>5</sup>

A landlord may terminate a lease for non-payment of rent by giving the notice prescribed in section 9 of the Landlord and Tenant Act, as well as by pursuing the remedy prescribed in section 8.<sup>6</sup>

### § 103. Agency—How proven.—A notice to quit

<sup>1</sup> Consolidated Coal Co. of St. Louis v. Schaefer, 135 Ill. 210.

<sup>2</sup> Dunne v. Trustees of Schools, 39 Ill. 578.

<sup>3</sup> Reed v. Hawley, 45 Ill. 40.

<sup>4</sup> Walker et al. v. Ellis, 12 Ill. 470.

<sup>5</sup> Dunne v. Trustees of Schools, 39 Ill. 578.

<sup>6</sup> Dickenson v. Petrie, 38 Ill. App. 155.

should be signed by the landlord or a properly authorized agent, and to authorize a recovery in forcible detainer, this must be proved. This cannot be done by producing a copy with an affidavit of the service; the witness serving it should be produced to prove the service.<sup>1</sup>

A notice to terminate a tenancy for non-payment of rent is not defective because it fails to mention any time for the payment of rent due, and it will be good even if it misdescribes the number of the lot, when it is apparent that it is right as to rent and lease intended, and proof is made, without objection, that the lot leased and the one named in the notice are the same.<sup>2</sup>

An attorney in fact, by another acting for him, may serve a notice upon a party in possession as a foundation for the action of forcible entry and detainer.<sup>3</sup>

To terminate a tenancy by the month or week, a notice for a like time is requisite, which should be fixed by the rent day.<sup>4</sup>

Where a tenant holds from month to month, he is entitled to a month's notice to quit before an action of forcible detainer will lie against him.<sup>5</sup>

**§ 104. Parol leasing for more than one year.—**Under a verbal lease of premises for five years at a monthly rent, it is leasing from month to month and the lessee is entitled to thirty days notice to terminate the tenancy.<sup>6</sup>

<sup>1</sup> Ball v. Peck, 43 Ill. 482; Vennum v. Vennum, 56 Ill. 430.

<sup>2</sup> Farnam v. Hohman, 90 Ill. 312.

<sup>3</sup> Eldridge v. Holway, 18 Ill. 445.

<sup>4</sup> Prickett v. Ritter, 16 Ill. 96.

<sup>5</sup> Seem v. McLees, 24 Ill. 192.

<sup>6</sup> Creighton v. Sanders, 89 Ill. 543.

In case of a tenancy at will, a notice of its termination is competent evidence, on the trial of an action of forcible detainer, to recover possession by the landlord.<sup>1</sup>

A tenancy at will is terminated by a demand of possession, without any notice to quit.<sup>2</sup>

The tenancy from year to year, although commenced under a parol agreement, can only be determined by the statutory notice of sixty days in writing.<sup>3</sup>

Where there is an occupation and tenancy under an agreement for the payment of rent monthly, a lessee becomes a tenant from month to month and entitled to thirty days' notice to quit, and if he desires to terminate the tenancy, he must give the landlord a like notice: the rights of the parties in this respect are equal.<sup>4</sup>

If a tenant remains in the premises after the determination of his lease by the death of the lessor, and the owner acquiesces in such holding over, the owner can recover the reasonable value for the use and occupation of the premises from the time the lease was terminated by the death of the lessor.<sup>5</sup>

Where land is occupied under a lease for a fixed time, the tenant is bound to surrender possession at the end of the time, without any notice to quit or demand of possession.<sup>6</sup>

### § 105. Delivery of key and acceptance of premises.

—If a lessee of rooms, before the expiration of the term,

<sup>1</sup> Reynolds v. Gage, 91 Ill. 125.

<sup>2</sup> Dunne v. Trustees of Schools, 39 Ill. 578.

<sup>3</sup> Tanton v. VanAlstine, 24 Ill. App. 405.

<sup>4</sup> <sup>5</sup> Hoagland et al. v. Crum, 113 Ill. 365.

<sup>6</sup> Schreiber et al. v. Chicago & Evanston R. R. Co., 115 Ill. 340.

abandons the premises, delivers the key to the lessor's agent and notifies the lessor of the fact by letter, and the lessor makes no objection, but retains the key, this will be sufficient evidence to authorize a jury in finding a termination of the tenancy.<sup>1</sup>

The execution of a new lease, with the tenant's consent, to another person who enters thereunder and pays rent, will amount to a surrender. There may be a parol surrender of a written lease; there may be a surrender by an abandonment of the premises by the tenant and an entry thereon by the landlord.<sup>2</sup>

Delivery of key and part payment of rent after suit brought, nothing being said about the settlement of the suit or the discharge of the action—held: that this did not terminate the plaintiff's right of action.<sup>3</sup>

All terms of leasing, like other contracts, expire by their own limitation, requiring no notice from either party to terminate.<sup>4</sup>

But where the action is brought by a landlord against a tenant, a notice is usually necessary to terminate the tenancy. Thus an action cannot be maintained against a tenant at will until his estate has been duly terminated by notice to quit.<sup>5</sup>

Where the parties cannot be considered as landlord and tenant and where the possession was obtained illegally, no notice to quit or demand for possession is necessary.<sup>6</sup>

<sup>1</sup> Dills v. Stobie et al., 81 Ill. 202.

<sup>2</sup> Williams v. Vanderbilt, 145 Ill. 238.

<sup>3</sup> Patterson et al. v. Graham, 140 Ill. 531.

<sup>4</sup> Fort v. McGrath, 7 Ill. App. 302.

<sup>5</sup> Seem v. McLees, 24 Ill. 192; Prickett v. Ritter, 16 Ill. 96.

<sup>6</sup> Kilburn v. Ritchie, 2 Cal. 145; Thorn v. Reed, 1 Ark. 480.

No notice to quit is necessary where a tenant or sub-tenant is holding over.<sup>1</sup>

Where a party makes an illegal and forcible entry upon land in the possession of another, no notice or demand for possession by the latter before bringing forcible entry and detainer is necessary.<sup>2</sup>

When there is a tenancy for a period of more than one year, no notice to the tenant is required in order to entitle the landlord to possession upon the expiration of the first term.<sup>3</sup>

A notice to quit is not necessary unless the relation of landlord and tenant exists, and where the tenant repudiates the tenancy and claims title in fee simple, he dispenses with the necessity of notice to quit.<sup>4</sup>

**§ 106. Statute of 1865 construed.**—Statute 1865, 107, par. 2. contemplates two notices, one to quit and the other of the landlord's intention to declare and insist upon a forfeiture. The legislature thereby intended to give the tenant ten days' notice, within which he might pay the arrears of rent and thus prevent a forfeiture; on their expiration without the payment of the arrears of rent, the tenancy terminates and the landlord may then bring suit and recover possession.

Under the statute of 1865, when a ten days' notice to terminate, on account of a failure to comply with the covenants of the lease, is given and the ten days expire after the notice and demand without the payment of

<sup>1</sup> Frank v. Taubman, 31 Ill. App. 592.

<sup>2</sup> Stillman v. Palis, 134 Ill. 532.

<sup>3</sup> Walker et al. v. Ellis, 12 Ill. 470.

<sup>4</sup> Herrell et al. v. Sizeland et al., 81 Ill. 457.

rent in arrears, the tenancy is terminated and the landlord may sue to recover possession.

It was the intention of the legislature to give the tenant ten days' notice within which he might pay the arrears of rent and thus prevent a forfeiture.<sup>1</sup>

As regards the time when the demand must be made, it should be made after the termination of the tenancy. Our Supreme Court says, in relation to the demand in writing for the possession of the premises, under the act in relation to forcible entry and detainer: "We are of the opinion that the demand should be made after the determination of the time for which such lands and tenements were let; such is obviously the meaning of the statute. Reason and analogy sustain this interpretation. No one should be put in the wrong by a demand which another had no right to make, of a thing he had no right to recover or possess. Could a bailee be charged with a conversion by a demand of the pledge before a tender of his advances, or the determination of his special title or right of possession?"<sup>2</sup>

Again, where no notice to quit, as required by law, was given it was held, that the tenancy continued when suit was commenced. It was held, that, where a person entered into possession of land, with the permission of the owner, as a mere occupant without paying rent, and made improvements, and afterward sold his improvements to another person, who went into possession, and the owner sold the land and his grantee brought eject-

<sup>1</sup> Chadwick v. Parker, 44 Ill. 326.

<sup>2</sup> Prickett v. Ritter, 16 Ill. 98; 18 Ill. 75; Doran v. Gillespie, 54 Ill. 366.

ment, the person purchasing the improvements of the mere occupant must have notice to quit, and this after eighteen years' possession.

And again, a tenant or occupant having no specific agreement for possession, if not in temporarily, is entitled to notice to quit. In short, where a tenant enters into possession, with the consent of the owner, he is not a wrong-doer, and can not be a wrong-doer until requested by demand to surrender possession, and refuses so to do.<sup>1</sup>

Under the former statute requiring the complaint to show that the necessary demand was made, it was held as to a complaint in a case, that it wholly failed to show that the notice in writing therein mentioned was served even in the manner stated, after the determination of the time for which the premises were let; nor did it show that it contained any such demand of possession as that required by the statute.<sup>2</sup>

This seems to establish the rule that demand for possession must be made after the termination or expiration of the lease.

And where possession of lands has been acquired by the assent of the owner, and has been long continued, the holding of possession may not be wrongful, until demand therefor has been made.<sup>3</sup>

And the purchaser of real estate at sheriff's sale can not maintain an action of forcible detainer after receiving a deed, without first making a demand for possession.<sup>4</sup>

<sup>1</sup> Chicago, Burlington & Quincy R. R. v. The President, etc., of Knox College, 34 Ill. 202.

<sup>2</sup> Doran v. Gillespie, 54 Ill. 366.

<sup>3</sup> Murphy v. Williamson, 85 Ill. 149.

<sup>4</sup> Dickason v. Dawson, 85 Ill. 53.

As regards the time that demand must be made, before the commencement of suit, the statute has been construed as follows: The statute does not require the demand to be made a reasonable time, or any definite time, before the commencement of the suit.<sup>1</sup>

**§ 107. How demand shall be made.**—As to how demand shall be made, the statute (chap. 80, sec. 10) says: “Any demand may be made or notice served by delivering a written or printed, or partly written and printed, copy thereof to the tenant, or by leaving the same with some person above the age of twelve years, residing on or in possession of said premises; and in case no one is in actual possession of said premises, then by posting the same on the premises. And the return of an officer authorized to serve process, or the affidavit of another person serving the same, is *prima facie* evidence of service.”

Again, a lease may be terminated by acts of the parties, without either a written or verbal agreement to that effect. In case the owner of lands and tenements exercises acts of ownership, inconsistent with the existence of the tenancy, as in case he should make a lease of the land to another, to commence immediately, or if he enters upon the land and cuts timber, or does any other act showing his determination to consider the tenancy at an end, he can not afterward be allowed to hold the tenancy in existence as against the tenant. And, on the other hand, the tenant may also, by his acts, terminate the tenancy so that he is estopped from claiming the relation of landlord and

<sup>1</sup> Huftalin v. Misner, 70 Ill. 205.



tenant in existence. In case a tenant should desert the premises, attorn to another as landlord, claim to hold possession by virtue of a title hostile to that of the landlord, and do any other act inconsistent with the tenancy, he will be considered, in all proceedings by the landlord, to have thereby terminated the tenancy existing between them.<sup>1</sup>

§ 108. **Yearly tenancy—Notice.**—But where the tenant holds from year to year, and where he holds to the end of a term of years, and continues in possession by consent of the landlord, the law will imply, in the absence of any express agreement, that he holds the premises upon the terms of the former lease, and the parties impliedly renew the previous agreement for another year; and it is necessary, if either landlord or tenant desires to terminate the tenancy, to notify the other party to the contract of his intention to put an end to the tenancy. The notice to terminate a yearly tenancy should be given as hereinbefore (page 120) stated, and may be given to quit on a particular day named in the notice or it may be given in general terms at the end of the current year of the tenancy, which will expire next after the end of sixty days from the service of the notice. In case the written lease is not accessible, and the landlord is not certain on what day the lease terminates, then the general terms should invariably be used, and if the exact day *is* known, the use of the general terms obviates the misapprehension of the exact day on the part of the tenant.

<sup>1</sup> Dills v. Stobie, 81 Ill. 202; Stewart v. Munford, 91 Ill. 58; Taylor's Landlord and Tenant, sec. 466.

But in case a particular day is named, and no general terms, as to the end of the tenancy, are used in the notice, the day mentioned must correspond with the day of the commencement, and not the day of the ending of the tenancy: for the tenant is not obliged to quit so long as his right continues, and his right is not determined until the year is fully ended. The day named must be the anniversary day of the commencement of the lease, so that a lease running from the 1st day of May, 1885, “for, during and until” the 30th day of April, 1886, can be ended by a notice to quit and give up possession on the 1st day of May, 1886.

A lease for a definite term of years expires by its own limitation at the last moment of the anniversary of the day from which the tenant was to hold, in the last year of the tenancy.<sup>1</sup>

And if the tenancy is for one year, it cannot be terminated during the year, but only at the end of the year, as neither party has a right to put an end to the tenancy before the expiration of the year; and if the occupation goes beyond that period, by the express or implied consent of the parties, and a new year is entered upon, the right to enjoy the whole year is implied by law. But if the holding over by the tenant is merely temporary or unavoidable, such as dangerous sickness in the tenant's family, and no acts of the parties indicate an intention to continue the lease, the implication of a continuance of the tenancy will not be raised, so that the holding over by the tenant must be continued for such a length of time after the expiration of the term as will reasonably war-

<sup>1</sup> Ackland v. Sutley, 9 Ad. & El. 879; Higgins v. Halligan, 46 Ill. 173.

rant the implication of an assent on the part of the landlord to such continuance, before the landlord can be bound thereby, and to make it necessary to give the tenant a notice to quit before commencing proceedings in forcible entry and detainer.<sup>1</sup>

Where a tenant for a year or years holds over after the expiration of his lease, without having made any new arrangement with his landlord under which such holding over takes place, the landlord, at his election, may treat the tenant as a trespasser, or as a tenant for another year, upon the same terms as in the original lease, and this though the tenant has no intention of holding over for a year, or of paying the same rent, the law fixing the liability of the tenant for holding over, independent of his intention; and the legal presumption of a renewal from the holding over can not be rebutted by proof of a contrary intention on the part of the tenant alone—such a holding over will bind the tenant if the landlord so elects, unless such holding over is excused in law by some fact showing that the holding was unavoidable and giving up the premises impossible. The legal presumption of a renewal of the tenancy, arising from a holding over, may always be rebutted by proof of a different intention on the part of both landlord and tenant, but this intention must be participated in by both of them.

**§ 109. When demand made.**—The demand should be made after the termination of the tenancy, in case of landlord and tenant, and must be served by delivering a copy thereof to the tenant, or by leaving such copy with some person above the age of twelve years, residing on

<sup>1</sup> Taylor Landlord & Ten. sec. 467 et seq.

or being in charge of the premises; or in case no one is in actual possession of the premises, then by posting the same on the premises. When such demand is made by an officer authorized to serve process, his return shall be *prima facie* evidence of the facts therein stated; and if such demand is made by any person not an officer, the return may be sworn to by the person making the same, and shall then be *prima facie* evidence of the facts therein stated. Formerly an individual could not make a return of service, but it was necessary to call him on the trial to prove the service,<sup>1</sup> as stated in sec. 99.

Again, where it was necessary to prove the termination of the tenancy, it is competent on the trial to admit the notice and demand made by the landlord as evidence of the termination of the tenancy, both as against the tenant or a sub-tenant to whom the tenant may have sub-let. This was so held on the trial of an action of forcible entry and detainer to recover possession by the landlord following the termination of a tenancy at will.<sup>2</sup>

**§ 110. When lease expires.**—Where a lease fixes the time for the expiration of the term and provided that the tenant shall restore possession of the demised premises, the duty of the tenant to yield up the possession will not be dependent upon a demand for possession or upon any proceeding to be taken or thing done by the landlord.<sup>3</sup>

<sup>1</sup> Ball v. Peck, 43 Ill. 482; Vennum v. Vennum, 56 Ill. 430.

<sup>2</sup> Reynolds v. Gage, 91 Ill. 125.

<sup>3</sup> Poppers v. Meagher, 148 Ill. 192.

## CHAPTER IX.

## JURISDICTION.

SECTION 111. Jurisdiction originally.

112. What necessary to give jurisdiction.

113. The venue.

114. In justice courts.

115. In circuit courts.

116. In various states.

§ 111. **Jurisdiction originally.**—Originally, in the State of Illinois, justices of the peace had original and exclusive jurisdiction in cases of forcible entry and detainer; and so we find it decided in *Ginn et al. v. Rogers*, 4 Gilm. 131, that the county court has not original jurisdiction in these cases, nor has the circuit court; and that the circuit court could obtain jurisdiction only by appeal from the judgment of a justice of the peace, in whom it was exclusively vested.

But it is otherwise now, as the statute on the question of jurisdiction provides that, “on complaint in writing by the party or parties entitled to the possession of such premises, being filed in any court of record, or with any justice of the peace, summons shall issue,” etc.—so that neither courts of record nor justice courts have exclusive jurisdiction, but both have original jurisdiction in such cases, and an appeal may be taken from either to the higher courts.

Consent of parties can not confer jurisdiction upon a court in which the law has not vested it.<sup>1</sup>

<sup>1</sup> *Ginn et al. v. Rogers*, 4 Gilm. 131.

When the relation of landlord and tenant is set up to give the court jurisdiction, the petition should show that the defendants entered into the premises under a lease, or by the assent of the plaintiff, or some circumstance from which it can be presumed that the relation of landlord and tenant exists.<sup>1</sup>

Prior to the act of 1861, there must have been either a forcible entry, or the relation of landlord and tenant must have existed, before a justice could take jurisdiction in this action.<sup>2</sup>

**§ 112. What necessary to give jurisdiction.**—In order to give a court jurisdiction in forcible entry and detainer between vendor and vendee, under the statute all of these three elements must be shown—

*First*—The relation of vendor and vendee must exist.

*Second*—The vendee must have obtained possession of the land under the contract.

*Third*—The vendee must have failed or refused to comply with his contract of purchase before obtaining a deed of conveyance.

If either of these elements is wanting, the court has no jurisdiction.<sup>3</sup>

The title is not involved in an action of forcible entry and detainer, a writ of error does not lie from the Supreme Court to the trial court to review the proceedings—such writ should emanate from the appellate court.<sup>4</sup>

If the description of the premises in the complaint is

<sup>1</sup> Beel v. Pierce, 11 Ill. 92.

<sup>2</sup> Steiner v. Priddy, 28 Ill. 179; Jackson v. Warren, 32 Ill. 331.

<sup>3</sup> Haskins v. Haskins, 67 Ill. 446.

<sup>4</sup> Kepley v. Luke, 106 Ill. 395.

so defective that the land can not be certainly located, the court does not obtain jurisdiction; nor would a judgment be effective, if rendered on a complaint wherein the premises are so defectively described.<sup>1</sup>

Thus, a description of "about fifteen acres, a part of a tract of one hundred and sixty acres," not showing which part of the one hundred and sixty acres, is too uncertain.<sup>2</sup>

Under the law requiring the complaint to be in writing under oath, the same could not be made verbally under oath and the justice thereupon issue summons.

The statute of forcible entry and detainer confers new rights and prescribes a remedy unknown to the common law and must be strictly pursued.<sup>3</sup>

In forcible entry and detainer cases, the statute conferring jurisdiction must be strictly pursued in the method of procedure prescribed by the statute.<sup>4</sup>

§ 113. **The venue.**—Generally, the action may be brought in any township in the county wherein the premises in question are situated.<sup>5</sup>

A process in forcible entry and detainer may issue to and be served in the county where the defendant resides, though different from that where the land is located.

However, in some States the venue seems to be governed by the residence of the parties and not by the

<sup>1</sup> *Schauntoeffel v. Belm*, 77 Ill. 569.

<sup>2</sup> *Beel v. Pierce*, 11 Ill. 92.

<sup>3</sup> *Burns et al. v. Nash*, 23 Ill. App. 552.

<sup>4</sup> *Wilber v. French*, 27 Ill. App. 76.

<sup>5</sup> *Murphy v. Lucas*, 2 O. 255; *Billings v. Chapin*, 2 Ill. App. 555; *Boxley v. Collins*, 4 Blackf. (Ind.) 320.

locality of the land, and the action is brought in the county and town where the parties reside.<sup>1</sup>

The jurisdiction in actions of forcible entry and detainer has been conferred by the statute upon the justices of the peace in the State of Illinois.<sup>2</sup>

In forcible detainer before a justice, the complaint is jurisdictional, and if the justice has no jurisdiction of the case, the Court of Appeals has none.<sup>3</sup>

In order to give a justice of the peace jurisdiction of an action of forcible entry and detainer, the complaint must contain sufficient allegations to bring it within one of the several cases anticipated by the statute.<sup>4</sup>

The filing of an affidavit preliminary to a summons in an action of forcible entry and detainer is essential to give the justice jurisdiction of the subject matter. The complaint cannot be made verbally, nor can a justice acquire jurisdiction by allowing an affidavit to be filed on the day of the trial. The affidavit is the jurisdictional foundation for the entire proceeding and must precede the summons.<sup>5</sup>

In actions of forcible detainer, a demand for possession is required to be made upon the tenant before the commencement of the suit. A complaint in writing must be made before the summons issues. Service of summons must be made in a manner different from any other actions at law, and no writ of restitution shall be issued until the expiration of five days after judgment.

<sup>1</sup> Billings v. Chapin, 2 Ill. App. 555.

<sup>2</sup> Ginn et al. v. Rogers, 9 Ill. 131; Haskins et al. v. Haskins, 67 Ill. 446.

<sup>3</sup> Abbott v. Kruse, 37 Ill. App. 549.

<sup>4</sup> Ballance v. Curtenius et al, 3 Gilman (Ill.) 449.

<sup>5</sup> Stolberg v. Ohnmacht, 50 Ill. 442.



These provisions cannot be changed by the contract of the parties.<sup>1</sup>

§ 114. **In justice courts.**—A justice has jurisdiction of the action of forcible entry and detainer, by a landlord against his tenant without regard to the amount of rent reserved in the lease. The right to possession alone is in question.<sup>2</sup>

The limitation of the jurisdiction of justices of the peace in civil cases to actions where the amount in dispute does not exceed \$200, does not apply to forcible entry and detainer.<sup>3</sup> The County and Circuit Court have no original jurisdiction in forcible entry and detainer cases. They can only obtain jurisdiction by way of an appeal from a justice of the peace.<sup>4</sup> This has since been changed by statute. (See § 111, *ante*.)

Unless, in such case, it is made to appear, that a complaint was filed with the justice and that that complaint was brought into the court, appealed to, and if lost, that its loss has been supplied, the case must be dismissed.<sup>5</sup>

§ 115. **In circuit courts.**—The circuit and superior courts, under the statutes of forcible entry and detainer, are clothed with special statutory and extraordinary power and stand upon the same ground and are governed by the same rules as courts of limited and inferior jurisdiction. Nothing, in such case, is within the jurisdiction

<sup>1</sup> French v. Willer, 126 Ill. 611.

<sup>2</sup> Hannigan v. Mossler et al., 44 Ill. App. 117.

<sup>3</sup> Hard v. Moon, 6 Cal. 161; Silvey v. Simmer, 61 Mo. 253; Weston v. Haley, 27 Vt. 283; Divell v. Brinkerhoff, 22 Mich. 371.

<sup>4</sup> Ginn et al. v. Rogers, 4 Gilman (Ill.), 131.

<sup>5</sup> Abbott v. Kruse, 37 Ill. App. 549.

of the court but what expressly so appears upon the face of the proceedings.<sup>1</sup>

But justices of the peace have no jurisdiction where the title to real property comes into question, and where a justice exercises his jurisdiction in this regard, he becomes a trespasser.<sup>2</sup>

Where a complaint in writing in a forcible detainer suit is transmitted, with the papers on appeal from a justice of the peace and the justice's transcript shows that a complaint was filed, this will be sufficient to give the court jurisdiction, there being no law requiring a justice of the peace to mark the papers filed in a case before him.<sup>3</sup>

The court says, that in this case the defendant in the court below was in possession of the land; he asserted ownership in fee by certain conveyances, which are in evidence. Manifestly, then, if the deeds held by the appellant are good,—and that is the sole question,—the title in fee has been transferred from the appellee to the appellant; we think, therefore, a freehold is involved and that we have no jurisdiction. Ordinarily, this form of action does not involve the title, but in such a case as this, the rights of the parties cannot be determined without testifying which of them is the owner of the fee, and where such is the case, we think the form of action is immaterial.<sup>4</sup>

It seems that in Georgia a justice of the peace of one county may administer the oath and issue the warrant

<sup>1</sup> Burns v. Nash, 23 Ill. App. 552.

<sup>2</sup> Haskins et al. v. Haskins, 67 Ill. 446.

<sup>3</sup> Reynolds v. Gage, 91 Ill. 125.

<sup>4</sup> Kepley v. Luke, 10 Ill. App. 403.

necessary to dispossess a tenant holding over in another county.<sup>1</sup>

§ 116. **In various states.**—In the States of Alabama, California, Kentucky and other States, justices of the peace alone have original jurisdiction in these cases.<sup>2</sup>

In Illinois, Indiana, Nevada, Tennessee, West Virginia and some other States, the higher courts have concurrent jurisdiction with the justices of the peace in forcible entry and detainer cases.<sup>3</sup>

There must be either a forcible entry or the relation of landlord and tenant must exist, before a justice can take jurisdiction in an action of forcible entry and detainer or of forcible detainer.<sup>4</sup>

<sup>1</sup> *Du Bignon v. Tufts*, 66 Ga. 59.

<sup>2</sup> *Dunham v. Carter*, 2 Stew. (Ala.) 496; *Townsend v. Brooks*, 5 Cal. 52; *Johnson v. Irwine*, 3 Metcalf (Ky.), 251; *Ginn et al. v. Rogers*, 4 Gilm. (Ill.) 131.

<sup>3</sup> *Witz v. Haynes*, 43 Ind. 470; *Hoops v. Meyer*, 1 Nev. 433; *White v. Suttle*, 1 Swan. (Tenn.) 169; *Gorman v. Steed*, 1 W. Va. 1.

<sup>4</sup> *Steiner v. Priddy*, 28 Ill. 179.

## CHAPTER X.

## THE COMPLAINT.

SECTION 117. Complaint heretofore and at this time.

118. Summons.

119. What the complaint should contain.

120. What description of premises required.

§ 117. **Complaint heretofore and at this time.**—The complaint is the foundation of the action, and in the history of the action, in the State of Illinois, has been jurisdictional, and must state a good cause of action.

So that, heretofore, in this State it has been a serious matter to properly draw a complaint in forcible entry and detainer, and there are many decisions by the Supreme Court on the sufficiency of the complaint.

Thus, a complaint in writing that the complainant “is entitled to the possession of a house and lot in the town of —, whereon one Wells lives, and that said Wells refuses to give possession of said house and lot, though he has been notified to do so in writing,” was held insufficient, the court saying, the plaintiff ought to have stated in his complaint, that the defendant willfully and without force held over the premises, after the term had expired for which they were leased to him, or, in other words, the relation of landlord and tenant should be shown to exist, and the holding over after a demand made in writing by the landlord. This was under the statute of 1819.<sup>1</sup>

<sup>1</sup> Wells v. Hogan, Breese, 337; Ballance v. Curtenius, 3 Gilm. 449.

But these cases must be, in the future, in a measure obsolete in this State, since the enactment of the late statute, which provides: What a complaint shall state.<sup>1</sup>

A complaint which shows a case within any of the provisions of the statute is sufficient to give the court jurisdiction.<sup>2</sup>

A general description, if sufficiently certain, is good.<sup>3</sup>

If objection is to be taken to the complaint, it must be done in the court that first tries the case, and it will be too late to make objection to the complaint on appeal, if no objection was urged in the court below by motion to quash.<sup>4</sup>

If the complaint is defective, it should be amended, on motion for leave to amend in the lower court. Amendments may be allowed in the discretion of the court at any time, even after a verdict by a jury. Thus, where a case was reversed by the Supreme Court, because it was not shown that the defendant was in possession of all the land described in the complaint, the cause went back on remandment to the circuit court, where the plaintiff was permitted to amend his complaint so as to include only part of the land therein described. Held, that such leave was properly granted.<sup>5</sup>

The complaint should be filed in court, and any motion made to quash complaint should be filed. This is true as a matter of protection, whether required by law or not.

<sup>1</sup> Rev. Stat., ch. 57, sec. 5.

<sup>2</sup> *Haskins et al. v. Haskins*, 67 Ill. 446.

<sup>3</sup> *Atkinson v. Lester*, 1 Scam. 407.

<sup>4</sup> *Leary v. Pattison*, 66 Ill. 203; *Brown v. Keller*, 32 Ill. 151; *Jackson v. Warren*, 32 Ill. 331.

<sup>5</sup> *Thompson v. Sörnberger*, 78 Ill. 353; *Spurck v. Forsyth*, 40 Ill. 438.

It has been held, that there is no law requiring justices of the peace to mark the papers in cases in their court filed.<sup>1</sup>

§ 118. **The summons.**—SEC. 5. On complaint in writing by the party or parties entitled to the possession of such premises being filed in any court of record, or with any justice of the peace in the county where such premises are situated, stating that such party is entitled to the possession of such premises (describing the same with reasonable certainty) and that the defendant (naming him) unlawfully withholds the possession thereof from him or them, the clerk of such court or such justice of the peace shall issue a summons directed to the sheriff or any constable of his county to execute; which summons, when issued by a justice of the peace, may be substantially in the following form:

STATE OF ILLINOIS, } ss.  
COUNTY OF COOK. }

The People of the State of Illinois, to the Sheriff or any Constable of said County—*Greeting*:

You are hereby commanded to summon....to appear before....., at....., on the....day of....., A. D. ....; at.....o'clock ... M.. to answer the complaint of..... wherefore he unlawfully withholds from him the possession of certain premises in said county (describing the premises), and hereof make due return, as the law directs.

Given under my hand this...day of....., A. D. 18...

In a forcible entry and detainer suit, the complaint is a mere pleading, not required to be sworn to and not

<sup>1</sup> Reynolds v. Gage. 91 Ill. 125.

required to be made or signed by the plaintiff in person; it may be made by an agent or attorney.<sup>1</sup>

The complaint in forcible entry and detainer must show the relation of landlord and tenant to have existed; that the time for which the premises were let has expired and that the tenant persists in holding the premises after demand made in writing for the possession.<sup>2</sup>

No precise form of complaint is essential. It is sufficient, if the complaint shows the relation of landlord and tenant to have existed; that the rent term has expired and that the tenant is holding over after demand made in writing for possession thereof.<sup>3</sup>

§ 119. **What the complaint should contain.**—In Illinois the complaint must show, that the plaintiff had the right of possession at the time of the commencement of the action, or that he was in the possession, actual or constructive, at that time, it not being necessary for him to allege the estate held by him; but a complaint for forcible entry and detainer can not be maintained, which merely alleges that the plaintiff was entitled to possession and that the defendant entered forcibly and kept him out, without averring that the plaintiff had actual or constructive possession, or that the relation of landlord and tenant existed.<sup>4</sup>

The complaint in forcible entry and detainer should describe the premises properly, instead of following an erroneous description in the lease. Upon trial it can be

<sup>1</sup> Patterson et al. v. Graham, 140 Ill. 531.

<sup>2</sup> Beel v. Pierce et al., 11 Ill. 92; Cairo, etc., R. R. Co. v. Wiggins Ferry Co., 82 Ill. 230; Dunne v. Trustees of Schools, 39 Ill. 578.

<sup>3</sup> Smith v. Killeck et ux., 5 Gillman (Ill.), 293.

<sup>4</sup> Whitaker et al. v. Gautier, 3 Gilm. (Ill.) 443.

shown that the defendant entered into the premises under the lease and paid rent therefor.<sup>1</sup>

It is not sufficient to allege, that A. entered forcibly upon the premises of which the plaintiff was in possession and that A. afterwards transferred the possession to the defendants, who have since forcibly kept possession.<sup>2</sup>

If the complaint shows the relation of landlord and tenant to have existed, that the time for which the premises were let had expired, and that the tenant persists in holding the premises after demand made, in writing, for the possession, it is sufficient, without stating that the plaintiff was ever in actual possession of the premises.<sup>3</sup>

**§ 120. What description of the premises required.**—The description in the complaint must be sufficiently accurate to readily identify and locate the premises for the possession of which the action is brought.<sup>4</sup>

The description of land in a complaint in an action of forcible entry and detainer, from which the land is susceptible of being easily and definitely located by a surveyor, is sufficient.<sup>5</sup>

Any description by which the premises can be readily identified and located is all that is required in a complaint in an action of forcible entry and detainer.<sup>6</sup>

If an officer executing a writ of restitution could iden-

<sup>1</sup> Gerlach v. Walsh, 41 Ill. App. 83.

<sup>2</sup> Ballance v. Curtenius, 3 Gilm. (Ill.) 449.

<sup>3</sup> The Cairo & St. L. R. R. Co. v. Wiggins Ferry Co., 82 Ill. 230.

<sup>4</sup> Stillman v. Palis, 134 Ill. 532.

<sup>5</sup> Dunne v. Trustees of Schools, 39 Ill. 578.

<sup>6</sup> The Cairo & St. L. R. R. Co. v. Wiggins Ferry Co., 82 Ill. 230.



tify the premises as described in the writ, the description is sufficient to sustain a complaint.<sup>1</sup>

But a description which falls short of the above rule is insufficient; for instance, a description "of about fifteen acres, a part of a tract of one hundred and sixty acres," not showing what part of the one hundred and sixty acres, is insufficient.<sup>2</sup>

A complaint, reading: "that the defendant, on, etc., came into the possession of the following described premises under a contract of purchase from affiant, to-wit: a part of the southwest quarter of the southeast quarter in section one, etc., and that the said defendant has failed to comply with his said contract of purchase and still holds possession wilfully and *without* force," etc., held, that the complaint was not sufficient to confer jurisdiction, and also that the description of the land as a part of a tract was void for uncertainty, and because it does not say that he failed to comply with his contract before obtaining a deed of conveyance.<sup>3</sup>

Three and one half acres off a specified tract is not a good description of land in a complaint.<sup>4</sup>

A description of premises sought to be recovered in an action of forcible entry and detainer, as "a part of the north half of the northeast quarter of section 15," etc., "with the house situated thereon." is void for uncertainty and confers no jurisdiction on the magistrate to hear and determine the case. The defect can not be supplied by parol evidence given on the trial.<sup>5</sup>

<sup>1</sup> Maloney v. Shattuck, 15 Ill. App. 44.

<sup>2</sup> Haskins et al. v. Haskins, 67 Ill. 446.

<sup>3</sup> Beel v. Pierce et al., 11 Ill. 92.

<sup>4</sup> Klingensmith v. Faulkner, 84 Ind. 331.

<sup>5</sup> Schaumtoeffel v. Belm, 77 Ill. 567.

“The premises enclosed by us, situated in the county of Cook and State of Illinois, being the same on which you now reside, containing about one hundred acres, more or less, and commonly called North Grove,” is sufficient description.<sup>1</sup>

<sup>1</sup> Atkinson v. Lester et al., 2 Ill. 407.

## CHAPTER XI.

## PLEADINGS — TRIAL — PROCEEDINGS.

- SECTION 121. Statutory provisions.
- 122. Pleadings.
  - 123. Amendments.
  - 124. Plea of not guilty.
  - 125. Time to amend.
  - 126. Questions of practice.
  - 127. Whom affected by judgment.
  - 128. Defendant's conclusive possession.
  - 129. Mistake in date of complaint.
  - 130. Judgments where several holdings.
  - 131. Pursuing two remedies at one time.

*Summons from Justice—Returnable When.*

§ 121. Statutory provisions.—SEC. 7. When the summons is issued by a justice of the peace, it shall specify a certain place, day and hour for the trial, not less than five nor more than fifteen days from the date of the summons.

*Summons from Court—Returnable When.*

SEC. 8.—When the summons is issued out of a court of record, the summons shall be made returnable on the first day of the next succeeding term of said court, and if not served ten days before the first day of the next term, the cause shall be continued to the next term of court.

*Service of Summons—Return—Publication.*

SEC. 9. Service of summons shall be made by deliver-

ing a copy thereof to the defendant, or by leaving such copy at his usual place of abode, with some person of the family of the age of twelve years or upwards, and informing such person of the contents thereof. The manner of the service, and the date thereof, shall be indorsed on the back of said summons by the officer serving the same. When service cannot be had as provided in this section, and it shall appear by affidavit or the return of the officer that the defendant is not a resident of this State, or has departed from this State, or on due inquiry cannot be found, or is concealed within this State so that process cannot be served upon him, then, if the suit is in a court of record, service may be had by notice as in case of attachment in courts of record, or if the suit is before a justice of the peace, by notice as in case of attachment before justices of the peace.

*Jury Trial Before Justice.*

SEC. 10. In trials under this act before justices of the peace, either party may have the case tried by a jury, if he shall so determine before the trial is entered upon, and will first advance the fees of the jurors. The number of the jurors shall be six, or any greater number not exceeding twelve, as either party may desire.

*Trial in Court of Record—Pleading.*

SEC. 11. Trials under this act in courts of record shall be the same as in other cases at law in such courts, provided no special pleading shall be required; but the defendant may, under the plea of "not guilty," give in evidence any matter in defense of the action.

*Default—Trial Ex Parte.*

SEC. 12. If the defendant does not appear (having been duly summoned as herein provided), the trial may proceed *ex parte* and may be tried by the justice of the peace or judge of the court, without the intervention of a jury.

§ 122. **Pleadings.**—There is no necessity for written pleadings, other than the complaint, in actions of forcible detainer in a justice court. Section 11 of the forcible entry and detainer act refers to actions brought in a court of record. The plea and abatement of the pendency of a prior suit may be stated orally.<sup>1</sup>

The general denial or the plea of not guilty is always a good defense; it puts in issue all the material allegations of the complaint and under it the statutes usually allows all the matter of excuse, justification or avoidance to be proved. Where the declaration alleged, that the plaintiff obtained judgment in the action of forcible entry and detainer and the plea did not deny it, no evidence of that fact was necessary, as it was solemnly admitted by the pleadings.<sup>2</sup>

Formal defects in the proceedings may be taken advantage of by a plea in abatement, as in other actions.<sup>3</sup>

The allegations of the complaint must be construed most strongly against the pleader, and when he says he has possession and at another time avers the contrary,

<sup>1</sup> Steele v. Grand Trunk Junction Ry. Co., 125 Ill. 385.

<sup>2</sup> Watson v. Whitney, 23 Cal. 375; McGlynn v. Moore, 25 Cal. 348.

<sup>3</sup> Shunick et al. v. Thompson, 25 Ill. App. 619; Steele v. Grand Trunk Junction Ry. Co., 17 N. E. Rep. 483.

the complaint shows no ground of action. The rule that a judgment on a plea in abatement is final in an action for specific recovery of land applies to an action under the Illinois forcible entry law.<sup>1</sup>

In landlord and tenant cases, the tenant is usually estopped to deny his landlord's title, but he may attorn to another claiming title from the landlord and defend on that ground; he may plead that the term has not expired; he may plead fraud on part of the landlord in obtaining a lease when the property was already held under a contract of sale.<sup>2</sup>

Pending an appeal, an injunction will not be issued to restrain the execution of a writ of restitution, this object being usually accomplished by the appeal taken by the appellant, for which provision is made in the statutes of most of the States.

The fact, that a landlord had instituted an action of forcible entry and detainer against his tenant, would not operate to deprive the landlord of his right to make entry under the agreement in the lease, he having a right to resort to either or both remedies at the same time.<sup>3</sup>

**§ 123. Amendments.**—In commencing the action of forcible entry and detainer, the only safe course is to observe the requirements of the statute and its construction by the supreme court in decided cases.

Care should be taken to have the notice to terminate the tenancy, the demand for possession, the complaint and

<sup>1</sup> Dickinson v. McGill, 9 Cal. 47.

<sup>2</sup> Locke v. Frasher, 79 Va. 409; Alderson v. Miller, 15 Gratt. (Va.) 279.

<sup>3</sup> Fabri v. Bryan et al., 80 Ill. 182.

the summons on the defendant, all correctly prepared, as the law and facts require. And when the trial commences, if any of these are informal, the defect should be remedied by amendment *instantly*. Any action of forcible entry and detainer that may be brought will come under a clause of the statute as hereinbefore set forth. And on the trial of the case, it is necessary to specially see that no part of the evidence necessary to sustain the action is omitted.

To illustrate: If the notice and demand have been made by an authorized agent, the proof must show that the agent was authorized, and that the act done by him in making the notice or demand, was done in his capacity as agent.

§ 124. **Plea of not guilty.**—The statute provides as follows:

“In trials under this act before justices of the peace, either party may have the cause tried by a jury, if he shall so determine, before the trial is entered upon, and will first advance the fees of the jurors. The number of jurors shall be six, or any greater number not exceeding twelve, as either party may desire.”

“Trials under this act in courts of record, shall be the same as in other cases at law in such court; *provided*, no special pleadings shall be required; but the defendant may, under the plea of ‘not guilty,’ give in evidence any matter in defense to the action.”

“If the defendant does not appear (having been duly summoned as herein provided), the trial may proceed *ex parte*, and may be tried by the justice of the peace or judge of the court, without the intervention of a jury.”<sup>1</sup>

<sup>1</sup> Rev. Stat. chap. 57, secs. 10, 11, and 12.

The proceedings under the statute of forcible entry and detainer, being summary and contrary to the course of the common law, must strictly conform to the requirements of the statute.<sup>1</sup>

Appeals in a forcible entry and detainer case are subject to the same rules of practice as appertain to ordinary appeals from justices of the peace.

**§ 125. Time to amend.**—In practice, in cases of forcible entry and detainer, amendments may be made in the complaint and other papers in the case as fully as in any other cases. Even the appeal bond may be amended in the discretion of the court.<sup>2</sup>

And the supreme court has held that, where a party desires to amend an appeal bond, it is the exercise of a right conferred by the statute, which cannot be refused. The court, however, has the right to fix the time within which it shall be done. In the case here cited, the plaintiff in error offered to amend his bond, but the court refused to permit him to do so, and dismissed the appeal, and in so refusing committed an error for which the judgment of the court below was reversed.<sup>3</sup>

Generally, all amendments are in the discretion of the court, and are allowed or refused as the court may deem most conducive to the furtherance of justice under the particular circumstances of the case.<sup>4</sup>

And the court, after holding that there was no error

<sup>1</sup> Wells v. Hogan, Breese. 337.

<sup>2</sup> Harlan v. Scott, 2 Scam. 65.

<sup>3</sup> Weist v. The people, 39 Ill. 507; Carroll v. City of Jacksonville, 2 Bradw. 481; Spurck v. Forsyth, 40 Ill. 438.

<sup>4</sup> Ballance v. Curtenius et al., 3 Gilm. 449.



in granting leave to amend the complaint, added: "Even if error could be assigned in the exercise of a discretionary power of this nature." If an appeal bond is insufficient, it is the duty of the court to require a new bond, and dismiss the case unless the bond is given within the required time. And no motion is necessary for leave to file a new bond when the first is held insufficient.<sup>1</sup>

If a bond is given on appeal from the justice court, and is adjudged informal or otherwise insufficient, the party executing the same shall be in no wise prejudiced by reason of such informality or insufficiency, provided he shall, in a reasonable time, file a new and sufficient bond. Almost any attempt, made in good faith, to execute an appeal bond, requires the court to allow such amendments or such new bonds as will obviate the imperfections.<sup>2</sup>

Technical defects in the transcript from the justice's docket, or in the appeal bond, will not prevent the appellate court taking jurisdiction of the appeal. The objecting party should obtain a rule to remedy the defect.<sup>3</sup>

Where a complaint is defective, a motion to quash is the proper practice. This motion should be made before trial; and if no objection is made to the complaint in the court below, it is too late in the Appellate Court. And on trials before justices of the peace, any matter in abatement should be insisted on at an early stage in the suit.<sup>4</sup>

<sup>1</sup> *Wear v. Killeen*, 38 Ill. 259.

<sup>2</sup> *Hinman v. Kittenman*, 40 Ill. 254.

<sup>3</sup> *Fink et al. v. Disbrow*, 69 Ill. 76.

<sup>4</sup> *Leary v. Pattison*, 66 Ill. 203; *Jackson v. Warren*, 32 Ill. 331; *Doran v. Gillespie*, 54 Ill. 366; *Huftalin v. Misner*, 70 Ill. 55; *Center v. Gibney*, 71 Ill. 557.

§ 126. **Questions of practice.**—As a free-hold is not involved in an action of forcible detainer, a writ of error does not lie from this court to the trial court to review the proceedings: such writ should emanate from the Appellate Court.<sup>1</sup>

In an action of forcible entry and detainer, the court cannot look to the equities of the parties, but must enforce their strict legal rights.<sup>2</sup>

In an action of forcible entry and detainer, the inquiry whether the plaintiff is entitled to rent or damages is improper. No judgment can be rendered for either.<sup>3</sup>

Forcible detainer cannot be maintained unless the defendant's possession is shown.<sup>4</sup>

A suit for forcible entry and detainer not being maintainable because of a failure to make the statutory demand, the defendant appealing from the justice's judgment, in behalf of plaintiff, will not estop the plaintiff from giving the required notice and beginning another suit without first dismissing the appeal suit in question.<sup>5</sup>

Parol evidence cannot be heard to prove that the trustee in a deed of trust in fact made no sale under the same to contradict the deed of trust and the deed of the trustee made in foreclosure.<sup>6</sup>

Proof that the plaintiff was possessed of part of the premises described in the complaint does not authorize a

<sup>1</sup> *Kepley v. Luke*, 106 Ill. 395.

<sup>2</sup> *Ill. Cent. R. R. Co. v. B. & O. & C. R. R. Co.*, 23 Ill. App. 531.

<sup>3</sup> *Shunick et al. v. Thompson*, 25 Ill. App. 619.

<sup>4</sup> *Bowman v. Mehring*, 34 Ill. App. 389; *Murphy v. Dwyer*, 11 Ill. App. 246.

<sup>5</sup> *O'Malia et al. v. Glynn*, 42 Ill. App. 51.

<sup>6</sup> *Windett v. Hurlbut*, 115 Ill. 403.

recovery of such part. The act regulating the action requires a particular description of the premises to be made in the complaint, and the proof must follow and conform to the description;<sup>1</sup> but this matter is now regulated by Par. 17 of the statute.

In forcible entry and detainer cases, the statute requires a particular description to be made in the complaint of the premises sought to be recovered and the proof must follow and conform to the description to warrant a recovery.<sup>2</sup>

The refusal of the Circuit Court to permit an amendment of the complaint in an action of forcible entry and detainer cannot be assigned for error.<sup>3</sup>

A variance between the verdict and judgment in an action of forcible detainer, as to certain lands, was held to be fatal.<sup>4</sup>

§ 127. **Whom affected by judgment.**—A judgment in forcible entry and detainer is conclusive only as to the right of possession, and in a certain class of cases as to the existence of the relation of landlord and tenant between the parties and as to the tenant's wrongful holding over.<sup>5</sup>

A landlord recovered a judgment in forcible detainer against his tenant and sued for rents. The tenant set up in defense an injury for the breach of a covenant in the lease and also brought his action against the land-

<sup>1</sup> Thompson v. Sornberger, 59 Ill. 326.

<sup>2</sup> House v. Wilder et al., 47 Ill. 510.

<sup>3</sup> Ballance v. Curtenius et al., 3 Gilman (Ill.) 449.

<sup>4</sup> Fanning v. N. W. Mutual Life Ins. Co., 6 Ill. App. 536.

Keating v. Springer, 146 Ill. 481.

lord to recover for the breach of his covenants. Held, that the judgment was no bar to the second suit and did not preclude the tenant from recouping damages against the rent.<sup>1</sup>

One who does not purchase *pendente lite* cannot be injuriously affected by a judgment or decree to which he was not a party.<sup>2</sup>

Where the tenants were trespassers, it was proper for the court to direct the jury that they might allow interest on the rental value of the premises wrongfully withheld.<sup>3</sup>

When judgment is passed in forcible entry and detainer, under a power in the lease and the tenant enters a motion to vacate the judgment and files therewith an affidavit disclosing a good defense in law to the plaintiff's action, the motion should be granted.<sup>4</sup>

An execution levied on goods on leased premises, prior to the distress, takes precedence of any claim the landlord may have for the rent of the building in which the goods are kept.<sup>5</sup>

A judgment in the case being for a sum equal to the entire amount that would accrue to the end of the term, to be discharged upon the payment of the rent found due, up to the bringing of the present suit, together with interest, this court holds, that the same is erroneous, and that it should have been that plaintiff have and recover his debt to the amount of the accrued rent and his dam-

<sup>1</sup> Keating v. Springer, 146 Ill. 481.

<sup>2</sup> Shumick et al. v. Thompson, 25 Ill. App. 619.

<sup>3</sup> Lambert et al. v. Borden, 16 Ill. App. 431.

<sup>4</sup> Ryan v. Kirchberg, 17 Ill. App. 132.

<sup>5</sup> Rowland v. Hewitt, 19 Ill. App. 450.

ages and the amount of the interest thereon and his costs and charges.<sup>1</sup>

Where a complaint in forcible entry and detainer is defective in substance, a motion to quash the complaint will avail the party alleging the deficiency.<sup>2</sup>

A motion to quash the complaint and dismiss the cause, because the description of the premises is insufficient, and for want of a demand, comes too late after the jury is impaneled and sworn and the trial has commenced.<sup>3</sup>

An objection to the sufficiency of the complaint in forcible detainer must be made by motion to quash before trial; such defect cannot be taken-advantage of on the trial.<sup>3</sup>

Where, by the terms of a lease, payments are to be made in monthly installments, action may be brought to recover for more than a month if then due, and the plaintiff is not required to wait until the expiration of a year or any particular time longer than a month before bringing suit.<sup>4</sup>

As the proceeding of forcible entry and detainer is in derogation of the common law and given by statute only, the requirements of the statute must be substantially observed and pursued.<sup>5</sup>

**§ 128. Defendant's collusive possession.**—Where a defendant obtained possession of premises through collusion with the plaintiff's tenant, he cannot, until he has

<sup>1</sup> *N. W. Brewing Co. v. Manion*, 47 Ill. App. 627.

<sup>2</sup> *Doran v. Gillespie*, 54 Ill. 366.

<sup>3</sup> *Leary v. Pattison*, 66 Ill. 203.

<sup>4</sup> *Consolidated Coal Co. of St. Louis v. Pears et al.*, 39 Ill. App. 453.

<sup>5</sup> *Schaumtoeffel v. Belm*, 77 Ill. 567.

surrendered the possession to the landlord, set up as against the landlord a right of possession otherwise acquired.<sup>1</sup>

An appearance before a justice of the peace, in an action of forcible detainer, does not waive any defect in the notice to deliver possession.<sup>2</sup>

Proceedings under statute for forcible entry and detainer must strictly conform to the requirements of the statute.<sup>3</sup>

A defendant may set up and prove as a defense to this action, that the plaintiff in the suit disclaimed the right of possession prior to the defendant's entry.<sup>4</sup>

A judgment should not be rendered against several defendants where the evidence shows that only one of them was in possession of the property in question.<sup>5</sup>

A lease for a term exceeding ten years, of lands with improvements, may be taxed and the interest of the tenant sold. It would seem, on execution, that the judgment in such case should be against the leasehold, where it is rendered for non-payment of taxes.

An objection not taken in a court below will not be noticed on appeal unless the complaint is so defective in substance that no judgment can be rendered for any particular premises.<sup>6</sup>

**§ 129. Mistake in date of complaint.**—That a complaint bears date two years subsequent to the other pro-

<sup>1</sup> Ragor v. McKay et al., 44 Ill. App. 79.

<sup>2</sup> Seem v. McLees, 24 Ill. 192.

<sup>3</sup> Wells v. Hogan, 1 Ill. 337.

<sup>4</sup> Dudley et al. v. Lee, 39 Ill. 339.

<sup>5</sup> Norris v. Pierce, 47 Ill. App. 463.

<sup>6</sup> Hilliard v. Carr, 6 Ala. 557.

ceedings in the case, will be considered a mere clerical error, and not available.<sup>1</sup>

On dismissal of an appeal by the defendant in a case of forcible detainer, the court may award restitution.<sup>2</sup>

In an action for forcible entry and detainer, the fact that the plaintiff's lease, under which he was in possession at the time of the defendant's entry, expired before the trial of the action, is no bar to a recovery.

An heir cannot maintain an action upon a bond filed on an appeal from a judgment in an action of forcible entry and detainer, to recover damages accruing after the death of the obligee therein, who was the father of plaintiff, and before the surrender of the possession of the property in question.<sup>3</sup>

**§ 130. Judgment where several holdings.**—SEC. 15. Whenever there shall have been one lease for the whole of certain premises, and the actual possession thereof, at the commencement of the suit, shall be divided in severalty among persons with, or other than, the lessee, in one or more portions or parcels, separately or severally held or occupied, all or so many of such persons, with the lessee, as the plaintiff may elect, may be joined as defendants in one suit, and the recovery against them, with costs, shall be several, according as their actual holdings shall respectively be found to be.

The action will not lie against two or more holding in severalty.<sup>4</sup>

<sup>1</sup> Powers v. David, 6 Ala. 9.

<sup>2</sup> Harlan v. Scott, 3 Ill. 65.

<sup>3</sup> Keegan et al. v. O'Callaghan, 35 Ill. App. 142.

<sup>4</sup> Gould et al. v. Hendrickson, 9 Ill. App. 171; Reynolds v. Thomas et al., 17 Ill. 207.

Four notices in writing, of a demand of possession of land, prepared at the same time and all alike except that three of them are addressed to three different occupants of the land, and the fourth one is retained by the party preparing them, all are original duplicate papers, and the names of parties addressed are not part of the notice, and the one retained is properly admissible in evidence as a written demand to support an action of forcible entry and detainer.<sup>1</sup>

Color of title is a question of law.<sup>2</sup>

§ 131. **Pursuing two remedies at the same time.**—A seeming conflict of remedies arises where judgment, for possession of lands and tenements, is rendered by the chancery court, while the action of forcible entry and detainer is pending on appeal. But this conflict is avoided by pursuing both remedies until satisfaction of one is had, exactly as two judgments may be obtained on the same claim, but the satisfaction of either judgment bars all further proceedings. A chancery court can not be ousted of jurisdiction by the pendency of a forcible entry and detainer case in the justice court.

Judgment was obtained by Whittaker against Kessinger, in an action of forcible entry and detainer, before a justice of the peace, for the possession of the premises in question, from which judgment Kessinger took an appeal to the circuit court. Pending this appeal, the circuit court in chancery rendered a decree against Whittaker for the recovery of the same premises. It was

<sup>1</sup> Blanchard et al. v. Pratt, 37 Ill. 243.

<sup>2</sup> Woodward v. Blanchard, 16 Ill. 424; Blanchard et al. v. Pratt, 37 Ill. 243.



then objected that the pendency of the forcible entry and detainer suit barred the proceeding in chancery while the suit was so pending on appeal. The court held that the remedies are concurrent, and that either or both of them might be pursued until a satisfaction was had of one or the other, which satisfaction would operate as a bar to any further proceedings. Were a bar or abatement to apply to either proceeding, it would rather be to the suit at law. The chancery court had jurisdiction of the whole subject matter before the commencement of the suit at law, and can not be ousted of its jurisdiction by the pendency of a forcible entry and detainer suit in a court of law.<sup>1</sup>

Where, by the terms of the lease, a greater sum of money is to be paid upon default in the payment of a lesser sum, at a given time, the provisions for the payment of the greater sum will be held a penalty. And where, by the terms of the contract, the damages are not difficult of ascertainment and the stipulated damages are unconscionable, the stipulated damages will be regarded as a penalty.<sup>2</sup>

<sup>1</sup> Vansant v. Allmon, 23 Ill. 30; Kessinger v. Whittaker et al., 82 Ill. 22.

<sup>2</sup> Poppers v. Meagher, 148 Ill. 192.

## CHAPTER XII.

## THE TENANT CAN NOT DISPUTE THE LANDLORD'S TITLE.

SECTION 132. Tenant's possession that of the landlord.

133. Jury can not consider title.

134. Tenant must restore possession to lessor.

135. May show that lessor's title has terminated.

136. What the tenant may show.

137. Deeds may be read to show boundaries.

138. The true meaning of the law.

139. Can show source of title.

140. Mistake, artifice and fraud.

141. The settled rule.

**§ 132. Tenant's possession that of the landlord.—**

The tenant cannot dispute the title of his landlord. The possession of the tenant is that of the landlord.<sup>1</sup>

A tenant is estopped from denying the title of his landlord.<sup>2</sup>

The question in forcible entry and detainer is not the title of the premises, but one of possession and right of possession.<sup>3</sup>

A tenant is estopped from denying the title of his landlord and his possession is subservient to the title of

<sup>1</sup> *Prettyman v. Walston et al.*, 34 Ill. 175; *Doty v. Burdick*, 83 Ill. 473; *Ankeny v. Pierce*, 1 Ill. 262.

<sup>2</sup> *McCartney v. McMullen*, 38 Ill. 237; *Rigg v. Cook*, 4 Gilman (Ill.), 336; *Knight v. Knight et al.*, 3 Ill. App. 206.

<sup>3</sup> *Thomasson v. Wilson*, 46 Ill. App. 398; *Sexton et al. v. Carley*, 147 Ill. 269; *Phelps v. Randolph*, 147 Ill. 335.

the landlord, and he will not be permitted to betray the possession with which he was intrusted.<sup>1</sup>

§ 133. **Jury can not consider title.**—In an action of forcible entry and detainer, the question of the title to the premises is not involved and can not be shown or considered by the jury.<sup>2</sup>

Title deeds may be introduced in an action of forcible entry and detainer to show the character or extent of the possession claimed.<sup>3</sup>

The validity of title to land cannot be tried in this action.<sup>4</sup>

Evidence of title in forcible entry and detainer, merely for the purpose of showing the character or extent of a possession, is proper.<sup>5</sup>

The tenant who entered into premises under the landlord, thereby acknowledges that the landlord is the owner.<sup>6</sup>

An under-tenant or other person let into possession by the tenant must yield the possession to the landlord; he succeeds to the original tenant's rights and nothing more.<sup>7</sup>

Where the owner of the fee accepts a lease of the premises from another and goes into possession under it, neither he nor his assignee can dispute the lessor's right

<sup>1</sup> Doty v. Burdick, 83 Ill. 473.

<sup>2</sup> Doty v. Burdick, 83 Ill. 473.

<sup>3</sup> Ragor v. McKay et al., 44 Ill. App. 79.

<sup>4</sup> Coppinger et al. v. Armstrong, 8 Ill. App. 210; Wheelan v. Fish, 2 Ill. App. 447.

<sup>5</sup> City of Bloomington et al. v. Brophy, 32 Ill. App. 400.

<sup>6</sup> Stillman v. Palis, 134 Ill. 532.

<sup>7</sup> Thomasson v. Wilson, 146 Ill. 384.

to lease, at least not until he shall have surrendered the possession to him.<sup>1</sup>

**§ 134. Tenant must restore possession to lessor.—**

A tenant is not permitted to dispute the title under which he enters; he must restore the possession to the landlord before he can assail his title.<sup>2</sup>

The principle which forbids a tenant to dispute the title of his landlord applies to any person who may acquire the possession from or through the tenant; he will acquire no greater rights than the tenant.<sup>3</sup>

Where actual possession of a part of the premises is shown to be in the plaintiff in an action of forcible detainer, the plaintiff's deed is proper evidence for the purpose of showing the extent of possession.<sup>4</sup>

Title is immaterial in a proceeding for forcible entry and detainer except to show the extent of the possession. Deeds may be read in evidence to prove boundaries or extent of possession.<sup>5</sup>

It is equally well settled that the tenant is not estopped to deny, that since his own entry into possession his lessor's title had expired, either by its own limitation, by the act of the lessor or by eviction by paramount title.<sup>6</sup>

*Hawes et al. v. Shaw*, 100 Mass. 137, was an action for possession similar to the action of forcible detainer in Illinois.<sup>7</sup>

<sup>1</sup> *Kepley v. Luke*, 106 Ill. 395.

<sup>2</sup> *Alwood v. Mansfield*, 33 Ill. 452.

<sup>3</sup> *Griffin v. Kirk*, 47 Ill. App. 258.

<sup>4</sup> *Fusselman v. Worthington*, 14 Ill. 135.

<sup>5</sup> *Hardin v. Forsythe et al.*, 99 Ill. 312.

<sup>6</sup> *Brooks v. Bruyn*, 18 Ill. 539.

<sup>7</sup> *Hilbourn v. Fogg et al.*, 99 Mass. 11.

After accepting the lease and thereby solemnly admitting the title, it is too late to deny it.<sup>1</sup>

**§ 135. May show that lessor's title has terminated.**—A tenant cannot dispute the title of his landlord so long as it remains as it was at the time the tenancy commenced; but he may show that the title under which he entered has expired, or been extinguished.<sup>2</sup>

Where a person enters into possession of lands as a tenant, before he can assail or call in question the title of the landlord, he must restore the possession to him and place the landlord in the same position he occupied before he parted with the possession of his lands.<sup>3</sup>

**§ 136. What the tenant may show.**—While a tenant cannot dispute his landlord's title, he may show it has terminated either by its own limitation or by conveyance.<sup>4</sup>

Deeds may be read in evidence on the trial of forcible entry and detainer to show the extent of the possession.<sup>5</sup>

A tenant may show that the title of a landlord has terminated, that the landlord has conveyed to another, or that his title has been sold on execution and in that manner passed into other hands.<sup>6</sup>

**§ 137. Deeds may be read to show boundaries.**—Deeds under which a party claims may be read in evidence in an action of forcible detainer for the purpose of showing the boundaries or extent of possession.<sup>7</sup>

<sup>1</sup> Dunbar v. Bonesteel, 3 Scam. (Ill.) 32.

<sup>2</sup> Bigler v. Furman et al., 58 Barbour, 555.

<sup>3</sup> Hardin v. Forsythe et al., 99 Ill. 312.

<sup>4</sup> St. John v. Quitzow, 72 Ill. 334.

<sup>5</sup> Smith v. Hoag, 45 Ill. 250.

<sup>6</sup> Hardin v. Forsythe, 99 Ill. 312.

<sup>7</sup> Griffin v. Kirk, 47 Ill. App. 258.

The principle, that the tenant cannot deny his landlord's title does not prohibit the tenant during his tenancy from purchasing an out-standing title and from asserting the same against the landlord after the expiration of the tenancy and after he yields up the possession.<sup>1</sup>

A deed to the premises is admissible in evidence on a trial of an action of forcible entry and detainer, for the purpose of establishing the extent of the plaintiff's claim; also to show the animus—the intention with which the party entered.<sup>2</sup>

The tenant may show that the lessor had but a limited interest, which has determined.<sup>3</sup>

**§ 138. The true meaning of the law.**—The true meaning of this is, that a tenant shall not deny the title under which he enters, or set up a title in another, in contravention of the one he has admitted. But a tenant may always show that his landlord's title has expired at the time of suit brought, or that he has sold his interest in the premises, or that it is aliened from him by judgment and operation of law. This is no denial of the landlord's original right. There is nothing in such a defense incompatible with the tenant's implied admission in accepting the lease.<sup>4</sup>

**§ 139. Can show the source of title.**—Although it is true that forcible entry and detainer is a possessory action in which title is not involved and cannot be tried,

<sup>1</sup> Gable v. Wetherholt. 116 Ill. 313.

<sup>2</sup> Pearson v. Herr, 53 Ill. 144.

<sup>3</sup> Wells v. Mason et al., 4 Scammon (Ill.), 84.

<sup>4</sup> Den ex dem. Howell v. Ashmore, 2 Zab. 265.

yet the rule has never been held so rigid as to preclude the defendant from showing the source of his claim.<sup>1</sup>

A lessee may show that his lessor's title has expired, but he cannot show that it never existed. Although a tenant without a surrender or eviction, or something equivalent thereto, cannot show that the title of his landlord was not a valid one when he entered under him, he can show that such valid title has been legally extinguished or determined, so that it no longer exists.

He does nothing thereby inconsistent with the lessor's right to grant the original lease. The tenant cannot be allowed to plead to his landlord's action *nil habuit in tenementis*, but he can plead *nil habet*, etc. A tenant does not deny that the landlord had a title at the beginning of the lease by showing that the same title has expired.<sup>2</sup>

In Taylor on Landlord and Tenant, section 705, it is said: "No proof of title is required in this action (ejectment) when it is brought by a landlord; since if a tenant has once recognized the title of the plaintiff and treated him as his landlord by accepting a lease from him, or the like, he is precluded from showing that the plaintiff had no title at the time the lease was granted."<sup>3</sup>

An exception to the general rule preventing a tenant from denying his landlord's title is, where he has been induced by artifice, fraud or mistake to accept the lease. In such case, he may show better title in himself, or in any third party under whom he claims. He will be permitted to avoid the lease by proof of such facts as would

<sup>1</sup> Nicholson et al. v. Walker et al., 4 Ill. App. 404.

<sup>2</sup> Herman on Estoppel, sec. 868.

<sup>3</sup> Langford v Selmes, 3 Kay & J. 220; Tilghman et al. v. Little, 13 Ill. 239.

warrant relief in equity from any other obligation created by deed.<sup>1</sup>

§ 140. **Mistake, artifice, and fraud.**—While a tenant cannot affect his landlord's interest by accepting a lease from another, he may, by accepting two leases of the same premises for the same time, estop himself from denying the title of either; yet an exception to this rule is recognized, where the tenant, already in possession under the first lease, accepts the second lease through mistake, artifice, or fraud.<sup>2</sup>

Although the tenant cannot deny his landlord's title, he may show that he had a limited estate only, which is determined by its own limitation before the cause of action accrued, as one to hold the estate for the life of another, or the like, which expired during the term; or that he has sold and conveyed the land; or that he has been evicted by title paramount; or that his title has been sold under execution and conveyed. This rule applies, whether the action be for the recovery of premises or for rent accrued after the extinguishment of the landlord's title.<sup>3</sup>

The tenant cannot set up a better title in himself or in a third person. He can do no act which may defeat or endanger the title of his landlord; he must surrender up the possession before he can assail or question the title and put the landlord in the position he occupied when he parted with the possession. And the same principle applies to those acquiring the possession from

<sup>1</sup> *Carter v. Marshall*, 72 Ill. 609.

<sup>2</sup> *Petterson v. Sweet*, 13 Ill. App. 255.

<sup>3</sup> *Corrigan et al. v. City of Chicago et al.*, 144 Ill. 537.



a tenant. The relation of landlord and tenant attaches to all who succeed to the possession through or from the tenant, and they have no greater right than the party from whom they receive possession.<sup>1</sup>

As a general rule, the title cannot be inquired into in this form of action; yet it is admissible to look to the title to define the boundaries; or in view of the question of damages or rents to be recovered in an action brought by a mere intruder against the rightful owner of the land; or where the claimant by fraud induces another to take a lease, or to enter under him upon a false representation as to his title. In such cases and, perhaps others, the title may be looked to upon the question, whether the case made out constitutes, in law, a wrongful entry or detainer.<sup>2</sup>

A tenant may admit, that the landlord had title at the time he leased the premises and then show that since that time the landlord had parted with his title, but he cannot show that the landlord had no title at the time he leased the premises, as this would violate the principle of the tenant denying his landlord's title. This distinction is set forth in Taylor's Landlord and Tenant, 7th ed. sec. 89, p. 70; sec. 629, p. 540; sec. 705, p. 593; and in sec. 629 it is said: "The rule is well settled that the tenant is not allowed to dispute his landlord's title after having accepted possession under him. A lessee may, however, plead that, although the lessor had an interest in the premises at the time of the making of the lease,

<sup>1</sup> *Sexton et al. v. Carley*, 147 Ill. 269.

<sup>2</sup> *Philips v. Sampson*, 2 Head (Tenn.), 429.

his interest terminated before the alleged cause of action arose.”

§ 141. **The settled rule.**—The well settled rule of law, by which a tenant who has entered into possession under an oral lease is estopped, so long as he continues in possession under the lease, to deny the lessor’s title at the time of making the lease, as against the lessor, his heirs and assigns, is founded on the injustice of allowing a person who has obtained possession by admitting the title of another, to deny that title, and, in case of failure of proof of it, hold the premises himself. The rule holds good where the actual title of the lessor is that of a mere tenant at will, and applies in every form of action, by which the lessor may seek to assert the rights reserved or promised to him in his lease.<sup>1</sup>

If a tenant claims premises adversely to his landlord, either for himself or another, his possession from that moment becomes tortious and the landlord may treat the tenancy as dissolved and regain the possession by an action of forcible entry and detainer. This principle applies to all who succeed to the possession from or through the tenant,—they occupy the same position and are held to the same responsibility.<sup>2</sup>

<sup>1</sup> Hilbourn v. Fogg et al., 99 Mass. 11.

<sup>2</sup> Fusselman v. Worthington, 14 Ill. 135.

## CHAPTER XIII.

## EVIDENCE.

SECTION 142. The proof necessary to support the action of forcible entry and detainer.

143. The proof in case of forcible entry.

144. Wrongful withholding.

145. In case of unoccupied lands.

146. Holding over after termination of lease.

147. Holding under contract of purchase.

148. Holding after judgment of ouster.

149. Defective description can not be supplied by parol proof.

§ 142. **The proof necessary to support the action of forcible entry and detainer.**—Declarations of an occupant of land at the time of entry may be shown to explain its character and are admissible in his behalf.<sup>1</sup>

The defendant cannot show an equitable title in himself to the premises.<sup>2</sup>

Evidence to disprove the title of the complainant in forcible entry and detainer is irrelevant and inadmissible, title not being in issue.<sup>3</sup>

On the trial of cases in forcible entry and detainer, when a demand is required, it must be proved to have been made as the statute requires on the trial, to entitle plaintiff to recover.<sup>4</sup>

<sup>1</sup> Croff v. Ballinger, 18 Ill. 200.

<sup>2</sup> Taylor v. White, 1 T. B. Mon. (Ky.) 37.

<sup>3</sup> Fortier et al. v. Ballance, 5 Gilman (Ill.), 41.

<sup>4</sup> Foss v. Foss, 2 Bradw. 411; Wheelan v. Fish, 2 Bradw. 447; Lehman v. Whittington, 8 Bradw. 374.

In a case where the demand was defective, it was claimed by the plaintiff that, by appearing before the justice of the peace and contesting the case on its merits, the defendant waived any defect in the demand, and that it was too late to take the objection on appeal. The court held, that the objection was not of a dilatory character. Until such demand was made, the defendant was not guilty of forcible detainer, under the statute. The proof of the demand was an essential part of the plaintiff's case, as much as proof of tenancy; and if no such demand was made, the defendant was not guilty.<sup>1</sup>

§ 143. **The proof in case of forcible entry.**—The evidence necessary to support the action of forcible entry and detainer will vary to some extent, according to the facts of each particular case arising under the statute.

*First*—To support the action under the first clause of Sec. 2, Chap. 57, of the statute in relation to forcible entry and detainer, it is necessary to prove—

*a*—That the plaintiff had the actual and exclusive possession of the premises claimed, at the time of the entry or invasion charged.

As to what will constitute a sufficient actual possession within the meaning of the statute, see chapter where the law and the cases on this subject are fully considered.

The following cases, coming directly under this clause of the statute, are here cited:<sup>2</sup>

<sup>1</sup> Seem v. McLees, 24 Ill. 193; Mann v. Brady, 67 Ill. 95; Thompson v. Sornberger, 59 Ill. 326.

<sup>2</sup> Allen v. Tobias, 77 Ill. 169; Huftalin v. Misner, 70 Ill. 205; Brooks v. Bruyn, 18 Ill. 539; Hardisty v. Glenn, 32 Ill. 62; Fairman v. Beal, 14 Ill. 244; Pearson v. Herr, 53 Ill. 144; Smith v. Hoag, 45 Ill. 250; Croff v. Pallinger, 18 Ill. 200.

*b*—That defendant invaded that possession by making a forcible entry. But actual force need not be proven, as any entry which is against the will of the occupant, is forcible within the meaning of the statute.<sup>1</sup>

*c*—That the possession so taken is withheld by the defendant.

It is necessary to prove the withholding by the defendant, because if he does not withhold the premises, he has nothing he can restore to the plaintiff, and the latter can take possession without process of law.

Under this clause of the statute, a demand of possession before bringing suit, would seem, upon principle, unnecessary, the defendant being a trespasser and his act unlawful. The principle is the same as in replevin, where a party comes into possession of property by his own wrongful act, he is not entitled to a demand before an action can be brought against him.

The statute specially requires a demand for possession in certain cases enumerated, and does not require that a demand shall be made in the case above mentioned. The inference, therefore, is, that a demand in this case is unnecessary.

And in Missouri it is held, that “unless the original entry is unlawful, it will be necessary to prove a demand,” thus implying that no demand is necessary where the original entry is unlawful.<sup>2</sup>

But the Illinois cases are silent as to this point, except that in *Huftalin v. Misner*, 70 Ill. 205, the court refused

<sup>1</sup> *Atkinson v. Lester*, 1 Scam. 407; *Smith v. Hoag*, 45 Ill. 250; *Croff v. Ballinger*, 18 Ill. 200.

<sup>2</sup> *Prehman v. Stifel*, 41 Mo. 184.

to admit that any demand was necessary in this class of cases.

§ 144. **Wrongful withholding.**—Still, it is the usual and perhaps safer course, to make a formal demand before bringing the action, and at the same time it is easier to prove a withholding, a demand having been made.

*Second.* To sustain the action for the second statutory cause, where a peaceable entry is made and possession wrongfully withheld, it is necessary to prove—

*a*—That the plaintiff is entitled to the exclusive possession of the premises.

*b*—That the defendant obtained peaceable possession thereof.

*c*—That demand was made for possession as required by the statute.

*d*—That possession was withheld after such demand.

§ 145. **In case of unoccupied lands.**—*Third.* To sustain the action in case the entry was made into vacant and unoccupied land, or tenements without right or title, it is necessary to prove—

*a*—That the lands were vacant or unoccupied.<sup>1</sup>

*b*—That plaintiff has such interest in the premises as entitles him to possession of the same, as it is presumed in law that he who has title of vacant lands has possession.

*c*—That defendant entered into possession of the premises, while so vacant or unoccupied, without right or title thereto.

<sup>1</sup> *McCartney v. McMullen*, 38 Ill. 237; *Hassett v. Johnson*, 48 Ill. 69.

Formerly ejectment was the only remedy, as it was held that forcible entry and detainer would not lie where plaintiff had not the actual possession at the time of the entry by the defendant.

To provide a more convenient remedy, this statute was passed.

No demand for possession, before bringing suit, is required by the statute, and for reasons above given, none would seem necessary.

*d*—That defendant unlawfully withholds the possession of the premises.

Whoever has the actual possession of land, claiming the fee, is presumed to have it until the contrary appears; and may maintain an action for the invasion of the possession against any one but him who has the legal title and right of possession.

But whoever has the title of unoccupied land is deemed, in law, to be in possession for all purposes in defense or protection of his rights. So that forcible entry and detainer can be maintained by the rightful owner against one making entry into unoccupied lands or tenements without right or title. But if A. takes possession, lawfully, of previously unoccupied lands, claiming title thereto, and B., who also claims title, invades A.'s possession, and it appears that A. entered in good faith, with intention of making improvements, B. can not maintain forcible entry and detainer against A., even if he has the better right.<sup>1</sup>

**§ 146. Holding over after termination of the lease.**  
—*Fourth.* To sustain the action of forcible entry and

<sup>1</sup> Brooks v. Bruyn, 18 Ill 539

detainer under the fourth statutory cause, it must be proven—

*a*—That the relation of landlord and tenant existed between the plaintiff and defendant.

*b*—That the landlord is entitled to possession of the premises.

*c*—That the tenancy has been terminated by its own limitation, conditions or terms, or by notice to quit or otherwise.

*d*—That the demand for possession has been made (if required).

But where the tenancy has been terminated by notice under sections 5 and 6, Revised Stat. chap. 80, no demand is necessary.

*e*—That the premises are withheld by defendant after the determination of the tenancy and demand for possession, if demand is required.

§ 147. **Holding under contract of purchase.**—*Fifth.* To sustain this action under the fifth cause named in the statute, it is necessary to prove—

*a*—That plaintiff sold the premises to the defendant by agreement to purchase, and that defendant took possession under this agreement.

*b*—That defendant has failed to comply with the agreement, before receiving a deed for the premises.

*c*—That demand in writing has been made by the plaintiff for the possession of the premises.<sup>1</sup>

*d*—That the plaintiff is entitled to the possession of the premises.

<sup>1</sup> *Lesh v. Sherwin*, 86 Ill. 421.



*e*—That defendant withholds possession of the premises after the said demand.

Where a vendor brings an action against the purchaser to recover possession for non-compliance with the contract of sale, it will be sufficient to show that the defendant, at the time the suit was brought, was in possession by himself or by others holding under him.

**§ 148. Holding after judgment of ouster.**—*Sixth.* To sustain the action of forcible entry and detainer under the sixth statutory cause, it must be shown in proof—

*a*—That plaintiff is a purchaser at a judicial sale, or otherwise, of the premises in question.

*b*—That the premises have been conveyed by a grantor in possession, or sold under a judgment or decree of court in this state, or sold by virtue of a mortgage or deed of trust.

*c*—That the time for redemption, if any allowed, has expired.

*d*—That demand in writing for possession has been made on the defendant.

*e*—That the party in possession refuses or neglects to surrender the same.<sup>1</sup>

To recover in this action under the act of 1861, against one who remains in possession after his rights have been divested by judicial sale, the plaintiff must show a valid judgment, execution and deed.

Inasmuch as the title to the property in question is not in issue in the action of forcible entry and detainer, a deed can not be introduced to show title, but can be introduced to show extent of possession—that is, where

<sup>1</sup> *Wheelan v. Fish*, 2 Bradw. 447.

actual possession of part of the premises is shown to be in the plaintiff, he may then introduce his deed to the premises for the purpose of showing that he possessed all of the tract, or to show the extent of his possession.

So, deeds can be used in evidence to show boundaries.<sup>1</sup>

And deeds may also be introduced to show the *animus* or intention with which a party enters, in connection with possession and improvement of a farm to which a wood lot is joined, the latter being the land in controversy.<sup>2</sup>

**§ 149. Defective description cannot be supplied by parol proof.**—If the description of the premises as set forth in the complaint is defective, it can not be supplied by parol proof.<sup>3</sup>

And proof must be made of the holding over by the tenant, in a case of termination of the tenancy. Where, on the trial of an action of forcible entry and detainer, it was proven that the relation of landlord and tenant existed between the parties, and the possession of the tenant and the payment of rent up to a time named; that a written notice had been served on defendant to quit and deliver up possession of said premises to plaintiff; but there was no evidence to show that, after the expiration of the time named in said notice, the defendant continued in possession of the premises, or neglected or refused to surrender the same to the plaintiff; it was held, that the gist of the action is the wrongful holding over by the tenant after the termination of the tenancy;

<sup>1</sup> Johnson v. Bantock, 38 Ill. 111; Harmon v. Larned, 58 Ia. 169.

<sup>2</sup> Huftalin v. Misner, 70 Ill. 205; Brooks v. Bruyn, 18 Ill. 539.

<sup>3</sup> Pearson v. Herr, 53 Ill. 145; Schaumtoeffel v. Behn, 77 Ill. 569.

and it is manifest that, in the absence of the proof of such holding over, he can not recover.<sup>1</sup>

And in an action of forcible entry and detainer, under the statute, by a purchaser at a foreclosure sale against a mortgagor in possession, the plaintiff must prove, not only a demand for possession of the premises, but also, that the defendant refused or neglected to surrender possession after such demand.<sup>2</sup>

Evidence may also be given by a vendor, in an action of forcible entry and detainer, against the vendee, to recover possession, of a written agreement to sell, and of a tender of a deed, to show that defendant has failed to comply with the agreement.<sup>3</sup>

In an action on an appeal bond, given in an action of forcible entry and detainer, conditioned to pay all rent due and to become due, the original lease is proper evidence to show what rent should be paid.

And in a similar action, a witness was allowed to testify to what rent he paid for a lot, about one-half the size of the one involved in the detainer suit, and adjoining it, as a circumstance to go to the jury, tending to establish the rental value; but the correctness of this ruling is doubtful.<sup>4</sup>

A written lease provided, that the tenant should surrender the demised premises at the expiration of the lease, and a co-temporaneous parol agreement was made to the effect, that the lessee might remain in the occu-

<sup>1</sup> *Murphy v. Dwyer*, 11 Bradw. 247.

<sup>2</sup> *Hersey v. Westover*, 11 Bradw. 197.

<sup>3</sup> *Leshner v. Sherwin*, 86 Ill. 421.

<sup>4</sup> *Clapp et al. v. Noble*, 84 Ill. 62.

pancy of the demised premises after the expiration of the lease, but as tenant from month to month. In this case, the parol agreement, made at the same time as the written lease, under seal, and being in reference to the same subject matter, must be regarded as merged into the writing and cannot be admitted in evidence.<sup>1</sup>

*Matters of evidence.*—Where the execution of a written instrument sued on had been proved and other evidence adduced in relation to it, it was a proper exercise of discretion for the court to permit the counsel for the plaintiff to read it to the jury for the first time in his closing argument.<sup>3</sup>

In regard to the *animus* with which a party enters into the possession of premises, and in regard to the question whether the entry was made against the will of the occupant, it is competent to prove the declarations of dissent or opposition, of the party in possession, to the entry of the other party, made on the occasion of the entry, and the jury have a right to consider such declarations as part of the *res gestae*, in considering their verdict.<sup>3</sup>

<sup>1</sup> Keegan et al. v. Kinnaire, 12 Ill. App. 484.

<sup>2</sup> Berrington v. Casey, 78 Ill. 317.

<sup>3</sup> Croff v. Ballinger, 18 Ill. 203.

## CHAPTER XIV.

## THE JUDGMENT IN FORCIBLE ENTRY AND DETAINER.

## SECTION 150. Statutory provisions.

- 151. Judgment unauthorized if description indefinite.
- 152. Judgment conclusive as to right of possession.
- 153. Circuit court can render judgment on dismissal of appeal.
- 154. The effect of a judgment in forcible entry and detainer.
- 155. Conclusive only as to matters legally determined.
- 156. Judgments by confession were heretofore sustained.
- 157. They are now invalid.
- 158. Judgments confessed only for *bona fide* debt due.
- 159. Against whom judgments may be entered.
- 160. Judgments as to sub-tenants.
- 161. Judgments as regards the wife of defendant.

## § 150. Statutory provisions.

*Plaintiff Entitled to Whole Premises—Judgment—Execution.*

SEC. 13. If it shall appear on the trial that the plaintiff is entitled to the possession of the whole of the premises claimed, he shall have judgment and execution for the possession thereof and for his costs.

*Plaintiff Entitled to Part—Judgment.*

SEC. 14. If it shall appear that the plaintiff is entitled to the possession of only a part of the premises claimed, the judgment and execution shall be for that part only

and for costs; and for the residue, the defendant shall be found not guilty.

*Dismissal as to Part—Judgment as to Part.*

SEC. 17. The plaintiff may at any time dismiss his suit as to any one or more of the defendants, and the jury or court may find any one or more of the defendants guilty and the others not guilty, and the court shall thereupon render judgment, according to such finding.

*Non-suit.*

SEC. 16. If the plaintiff is non-suited or fails to prove his right to the possession, the defendant shall have judgment and execution for costs.

§ 151. **Judgment unauthorized if description indefinite.**—A judgment in forcible entry and detainer is not authorized unless the description of the premises is sufficiently definite to locate the premises. For instance, a complaint set forth that the defendant on, etc., came into possession of the following described premises, under the contract of purchase from affiant, to-wit:

“A part of the S. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  in Section 1, etc.”

And judgment was rendered for the possession of the said land, whereupon the Supreme Court held:

“The statute requires that the complaint shall particularly describe the lands, tenements or possessions in question, and that the justice shall keep a record of the proceedings had before him. If this writ should be held good, then, by parity of reasoning, a writ which should command the officer to make restitution of a part of a

section of land, without other description than such as designated the section of land, would likewise be good. It was the manifest policy of the statute not to authorize any such rambling process, and, upon general principles, that in question was void for uncertainty."<sup>1</sup>

**§ 152. Judgment conclusive as to right of possession.**—A verdict and judgment of restitution in an action of forcible entry and detainer for a tract of land, part of a larger tract, all of which is claimed by the defendant under the same alleged title, is conclusive, in a subsequent ejectment, between the same parties upon the question of right of possession at the date of the forcible entry, not only as to the tract actually detained by the defendant but as to the whole.<sup>2</sup>

But judgment for the defendant is not sufficient to bar the second suit without extrinsic proof that the cause of action was the same in the prior as in the second suit. Where the only demand of possession shown appears to have been made after the determination of the first suit, the judgment for the defendant therein can not be held a bar to a second action brought after such demand.<sup>3</sup>

The successful party should have judgment for costs.<sup>4</sup>

**§ 153. Circuit Court can render judgment on dismissal of appeal.**—Where judgment was rendered against

<sup>1</sup> Haskins et al. v. Haskins, 67 Ill. 454; Hughes v. Streeter, 24 Ill. 647; Shackelford v. Bailey, 35 Ill. 387.

<sup>2</sup> Bradley v. West, 68 Mo. 69.

<sup>3</sup> Davis v. Lennen, 24 N. E. Rep. 885; Doyle v. Hallam, 21 Minn. 515; Star v. Stark, 1 Sawy. 275.

<sup>4</sup> Ind. B. & W. R. Co. v. Allen, 113 Ind. 308; Walker v. McGill, 40 Ark. 38; King v. Lawson, 98 Mass. 309.

the defendant by a justice of the peace, he appealed the case to the Circuit Court and afterwards dismissed his appeal. The Circuit Court thereupon rendered judgment that the plaintiff in the action recover possession and awarded a writ of possession. On objection that the dismissal of the appeal operated to remand the cause to the justice and the Circuit Court had no power to render the judgment it did, it was held, that the Circuit Court, having jurisdiction of the subject matter and of the parties, had jurisdiction to render the judgment. Whether the judgment was erroneous or not, it was not void; it was valid and binding in all collateral proceedings until reversed.<sup>1</sup>

**§ 154. The effect of a judgment in forcible entry and detainer.**—A judgment in an action of forcible entry and detainer decides and is conclusive only as to matters legally determined by the said judgment. The object of an action of ejectment is to try the title to property, while in an action of forcible entry and detainer the immediate right of possession is all that is involved, and the title cannot be inquired into for any purpose.<sup>2</sup>

“A judgment in an action of forcible entry and detainer cannot be pleaded as a bar to an action of ejectment for the reason that the questions involved in the two proceedings are different. In a proceeding for forcible entry and detainer, it is the mere naked possession, in fact, which is put in issue and of course the

<sup>1</sup> *Smith v. The People*, 99 Ill. 445.

<sup>2</sup> *Riverside Co. v. Townshend et al.*, 120 Ill. 9; *Mattocks v. Helm*, 5 Litt. 185; 15 American Decisions, 64; *Fish v. Benson*, 71 Cal. 428; *Williams v. Newcomb*, 16 Mo. 185; *Harvie v. Turner*, 46 Mo. 444; *Dale v. Doddridge*, 9 Nebr. 138.



judgment in such case cannot be evidence in an action of ejectment, in which the right of entry is the point in issue.

“Nor does the judgment furnish evidence of a right in the plaintiff to recover in an action for mesne profits.”

**§ 155. Conclusive only as to matters legally determined.**—“But such a judgment is conclusive and is final and binding as to all questions actually and necessarily litigated and determined. It is evidence of the right and extent of the plaintiff’s possession and the defendant is estopped from contesting the same.”

“So, also, in the said statutory classes of actions called by this name, the judgment is conclusive as to the existence of the relation of landlord and tenant between the parties and as to the defendant’s wrongful holding over. These issues can not be again tried under color of a suit in chancery.”<sup>1</sup>

A judgment determines only the right of possession and it does not bar the tenant from claiming the rent as purchaser of the landlord’s title under a trust deed.<sup>2</sup>

**§ 156. Judgments by confession were heretofore sustained.**—It was heretofore held in this State, that a lease containing a warrant of attorney to confess judgment in forcible detainer is sufficient to authorize such confession, if duly executed by the lessee, although executed in the name of the lessor by his agent, without proper authority.<sup>3</sup>

<sup>1</sup>Casey v. McFalls, 3 Sheed, 115; Mitchell v. Davis, 23 Cal. 381; Norwood v. Kirby, 70 Ala. 397; Black on Judgments, 663.

<sup>2</sup>Carson et al. v. Crogler, 9 Ill. App. 83.

<sup>3</sup>Johnson v. Crane et al., 22 Ill. App. 366.

But the later and correct view regarding the entry of judgments by confession is, that the practice is unauthorized; the doctrine being, that a judgment may be entered by filing a cognovit for rent due, on a power given in a lease.<sup>1</sup>

But the court had no power to enter the judgment by confession, in this form of proceeding, on the warrant of attorney contained in the lease, and the judgment is therefore *coram non iudice* and void.<sup>2</sup>

§ 157. **They are now invalid.**—The practice of entering judgment by confession upon a warrant of attorney without process in actions for tort, is not allowed by the common law; it is only allowed in respect to debts.<sup>3</sup>

The entry of a judgment by confession upon warrant of attorney contained in a lease is impliedly prohibited by the particular mode of proceeding prescribed by the forcible entry and detainer act.<sup>4</sup>

A judgment entered by confession under a power of attorney and cognovit in a forcible detainer suit is unauthorized by law and void. The court acquires no jurisdiction of the person of the defendant by the filing of the cognovit. The confession of judgment upon a warrant of attorney in an action of forcible detainer in a court of record is as irregular and unauthorized as it would be in a justice court. Such court of record does not proceed in forcible detainer by virtue of its power as a court of general jurisdiction, but derives its authority

<sup>1</sup> Little et al. v. Dyer, 35 Ill. App. 85.

<sup>2</sup> Willer v. French, 27 Ill. App. 76.

<sup>3</sup> French v. Willer, 126 Ill. 611.

<sup>4</sup> Willer v. French, 27 Ill. App. 76.

wholly from the statute and in such proceeding is to be treated as a court of special and limited jurisdiction.<sup>1</sup>

**§ 158. Judgment confessed only for bona fide debt due.**—The entry of a judgment by confession upon a warrant of attorney contained in a lease is impliedly prohibited by the particular mode of proceeding prescribed by the forcible entry and detainer act. Causes for the recovery of possession of real estate under the forcible entry and detainer act are based *not* upon a debt but a tort. The gist of the action is either a forcible entry or wrongful detainer. The plea is not guilty. The statute authorizing confessions of judgment in this State reads: “Any person for a debt *bona fide* due may confess judgment by himself or attorney duly authorized, without process;” the statute limiting this right to cases of a debt. The law-making power has never given sanction to confession of judgment in forcible entry and detainer cases; public policy is against it and courts should not sanction such an innovation.<sup>2</sup>

**§ 159. Against whom judgments may be entered.**—

Sec. 15, chap. 57, of the Revised Statutes, authorizes the bringing of forcible detainer by the landlord against the lessee, with others in whom the actual possession is divided, at the commencement of the suit. Judgment may be entered against the lessee, when sued, with his sub-tenant, though he is out of the actual possession.<sup>3</sup>

<sup>1</sup> French v. Willer, 126 Ill. 611.

<sup>2</sup> Burns v. Nash, 23 Ill. App. 552.

<sup>3</sup> Espen et al. v. Hinchliffe, 131 Ill. 468.

A judgment against a tenant is conclusive against the landlord if the latter interposed in aid of the tenant in his defense, or if the landlord had notice of the pendency of the suit and full opportunity of making a defense thereto.<sup>1</sup>

Where a landlord recovers a judgment in an action of forcible entry and detainer against his tenant, a sub-tenant who was not a party to the judgment cannot be put out of his possession under the writ unless he entered *pendente lite*.

§ 160. **Judgment as to sub-tenants.**—A sub-tenant is, by the express provision of the statute, liable to this action, and it has been so held by the court.<sup>2</sup>

A writ of possession can only go against the party to the suit or against those who came into possession under him since the commencement of the suit.<sup>3</sup>

Where there are several defendants and a portion of them are not proven to be in possession, the judgment against all is erroneous, as the judgment is entire and indivisible.<sup>4</sup>

In Kansas, the officer has no right to remove a party who does not hold under the defendant in the writ.<sup>5</sup>

The objection, that the wife ought to have been brought into the Circuit Court on appeal, is not good. She was no party to the judgment before the justice; the

<sup>1</sup> Thomsen et al. v. McCormick, 136 Ill. 135.

<sup>2</sup> Leindecker et al. v. Waldron, 52 Ill. 283.

<sup>3</sup> Brush v. Fowler, 36 Ill. 53.

<sup>4</sup> Godard et al. v. Liebermann, 17 Ill. App. 366.

<sup>5</sup> Wallace v. Hall, 22 Kas. 271.

judgment of the justice against the husband alone disposed of the complaint against her.<sup>1</sup>

Judgment against the husband alone is sufficient to oust both husband and wife, although summons were served on both.<sup>2</sup>

**§ 161. Judgments as regards the wife of defendant.**

—Where the wife was entitled to possession of the premises in question and held the same as heir, in common with other heirs of the former owner, the possession of her husband, if any, was in the right of his wife and the action should have been against both husband and wife; and the result of a judgment against him alone would be the separation of husband and wife, or the ousting of the one who had the right of possession, which in either case could not be done.<sup>3</sup>

In a case where the wife claimed to own the property, the court said :

The house was the dwelling house of the husband and not that of his wife, who was but a member of a family of which he was the head. The possession of the different members of the family was dependent on his rights, so that when the owner of the land obtained a judgment against him in forcible detainer for restitution of the premises, that house ceased to be his dwelling house; and that by termination of his rights, all incidental rights of the wife terminated also.<sup>4</sup>

<sup>1</sup> Bell v. Bruhn, 30 Ill. App. 300; Fabbri v. Cunio, 1 Ill. App. 240; Wells v. Reynolds, 3 Scam. Ill. 191; Wilderman et al. v. Sandusky, 15 Ill. 59.

<sup>2</sup> Bell v. Bruhn, 30 Ill. App. 300.

<sup>3</sup> Cofoid v. Bishop, 11 Ill. App. 117.

<sup>4</sup> Ennis v. Lamb, 10 Ill. App. 447.

Where the wife was in the house of her husband by virtue alone of the marriage relation, after a decree of divorce, it was held that her rights to any and all parts of the house will cease; and if she continues to remain thereafter against the will of her husband, she will be a mere intruder and is not a tenant at sufferance, nor entitled to notice to quit.<sup>1</sup>

<sup>1</sup> Brown v. Smith, 83 Ill. 291.

## CHAPTER XV.

### RESTITUTION.

SECTION 162. Definition of term.

163. Restitution—Concurrent remedies.

164. Jury must sign verdict.

165. Duty of officer in executing the writ.

166. Unknown sub-tenants.

167. Circuit court on appeal may remand case to justice to issue writ.

§ 162. **Definition of term.**—Restitution originally was placing back or restoring articles which have been lost by jettison; this is done where the remainder of the cargo has been saved at the general charge of the owners of the cargo, but when the remainder of the goods are afterwards lost, there is not any restitution. This was the maritime law signification of restitution, but in modern practice and in modern law it means the return of something to the owner of it or to the person entitled to it. So in the use of the term in regard to forcible entry and detainer it means the restoring or the returning of the possession of the premises in question to the party entitled to it.

§ 163. **Restitution — Concurrent remedies.** — The statute provides :

“ If any party shall feel aggrieved by the verdict of the jury or decision of the court, upon any trial had under this act, such party may have an appeal, to be taken to the same courts, in the same manner and tried

in the same way as appeals are taken and tried in other cases. Provided, the appeal is prayed and bond is filed within five days from the rendition of the judgment, and no writ of restitution, shall be issued in any case until the expiration of said five days."

A person entitled to the possession of lands sold under a judgment or decree, having obtained his deed, is entitled to have two concurrent remedies: (1) a writ of assistance issuing from the court rendering the judgment or decree, or (2) an action of forcible entry and detainer under the statute.<sup>1</sup>

Awarding a writ of restitution upon the dismissal of an appeal in a case of forcible entry and detainer is not error.<sup>2</sup>

In executing the writ of possession the officer may enter the premises, if necessary, for the purpose of removing the defendant and his property, but in doing so, if he uses unnecessary force and causes unnecessary damage he will be liable for his misconduct.<sup>3</sup>

**§ 164. Jury must sign verdict.**—If the defendant is found guilty upon the trial, the judge will award restitution of the premises which have been forcibly entered or forcibly held, with the costs and expenses of the proceeding, and the sheriff or constable is thereupon directed to cause the complainant to be put in full possession of the premises. In the states of Illinois and Indiana, all the jury are required to sign the verdict.<sup>4</sup>

**§ 165. Duty of officer in executing writ.**—In execut-

<sup>1</sup> Brackensieck v. Vahle et al., 48 Ill. App. 312.

<sup>2</sup> Harlan v. Scott, 2 Scammon (Ill.), 65.

<sup>3</sup> Miller v. White, 80 Ill. 580.

<sup>4</sup> Bloom v. Goodner, 1 Ill. 63; Test v. Devers, 2 Blackf. 80.



ing the writ of possession, the officer may enter the premises forcibly, if necessary, and having entered, it is his duty to remove all property as well as the person of the defendant, doing as little damage and using as little force as possible in order to effect that purpose.

§ 166. **Unknown sub-tenants.**—Where a tenant of the demised building secretly sub-lets the same to another person living with him, without the knowledge of the landlord, and both occupy the premises as before, and such sub-lessee, when examined as a witness on the trial of an action of forcible entry and detainer, against the original lessee, makes no claim to the property, the sub-tenant, after judgment for possession, will not be allowed to interfere and set up her rights there for the first time, but will be bound by the judgment.<sup>1</sup>

Appellee claimed to be the owner of the house situated on appellant's land and appellee's husband took from the appellant a lease, and judgment of ouster was afterwards rendered against him as tenant of the appellant; held, that he must be considered as head of the family and a warrant of restitution was properly served against him and all occupying with him. And, notwithstanding that appellee might have been the owner of the house, she could not retain possession of appellant's land in defiance of the writ of restitution.<sup>2</sup>

In the absence of any showing to the contrary, one not especially named in the writ of possession, but in the possession of the premises when the action of forcible

<sup>1</sup> Miller et al. v. White, 80 Ill. 580.

<sup>2</sup> Ennis v. Lamb, 10 Ill. App. 447; Johnson v. Fullerton, 44 Pa. St. 466.

entry was brought, will be presumed to have occupied the land *pendente lite* and be a proper subject for removal under the writ.<sup>1</sup>

**§ 167. Circuit Court on appeal may remand case to justice to issue writ.**—Where the Circuit Court affirms the judgment of the justice of the peace, it is not error to remand the cause to the justice to issue the writ of restitution.<sup>2</sup>

Where one co-partner dispossessed another, on a finding in an action for forcible entry and detainer in favor of the latter, he can be restored to his joint possession by the writ of restitution.<sup>3</sup>

<sup>1</sup> Thomasson v. White, 6 Baxter (Tenn.), 148.

<sup>2</sup> Murry v. Harper, 3 Ala. 374.

<sup>3</sup> Robertson v. Robertson, 2 B. Mon. (Ky.) 235.

## CHAPTER XVI.

## THE TENANT'S REMEDIES.

- SECTION 168. Tenant may abandon premises for landlord's fault.  
169. May sue for breach of contract.  
170. No relief against rent except by stipulation in lease.  
171. Defenses available to the tenant.  
172. Test questions for trial.  
173. Tenant's right to abandon premises.

§ 168. **Tenant may abandon premises for landlord's fault.**—Where a landlord has agreed in his lease to repair the demised premises and does not do so, the tenant has several remedies: he may abandon the premises.<sup>1</sup>

§ 169. **May sue for breach of contract.**—He may sue the landlord for damages for a breach of his covenant to repair.<sup>2</sup>

Or the tenant may make the repairs agreed to be made by the landlord and deduct the cost of the same from the rent.<sup>3</sup>

He may abandon the premises if, by reason of the failure of the landlord to make repairs, as agreed, the premises are rendered untenable.<sup>4</sup>

Rent in advance cannot be recovered in the absence of an agreement to that effect.<sup>5</sup>

<sup>1</sup> Bissell v. Lloyd et al., 100 Ill. 214.

<sup>2</sup> Block v. Ebner, 54 Ind. 544.

<sup>3</sup> Wright v. Lattin et al., 38 Ill. 293.

<sup>4</sup> Prescott v. Overstatter, 85 Pa. St. 534.

<sup>5</sup> Heissler et al. v. Stose, 33 Ill. App. 39.

The original landlord cannot maintain an action against a sub-tenant to recover rent due from the original lessee.<sup>1</sup>

As a general rule, a tenant has no relief against an express covenant to pay rent, unless he has protected himself by stipulation in the lease.<sup>2</sup>

**§ 170. No relief against rent except by stipulation in the lease.**—In the absence of a stipulation in the lease to the contrary, a tenant is bound to pay the stipulated rent, although the building on the premises is consumed by fire when in his possession.<sup>3</sup>

A clause in a lease, that a re-entry may be made without the same “working a forfeiture of the rent to be paid,” refers to the rents to be paid after the re-entry by the lessor, and the tenant is liable still to pay the rent for the premises; yet as against the same, he is entitled to credit for the rent received by the lessor after such re-entry.<sup>4</sup>

**§ 171. Defenses available to the tenant.**—The only rule to be followed in defending a suit for forcible entry and detainer, is to examine the requirements of the statute and the rules of our practice, step by step, and see if they have been complied with in the case at bar.

As to the summons, it makes no difference whether it is defective or not, if the defendant appears in court and defends the suit. In such case he can not complain that the summons was defective.<sup>5</sup>

<sup>1</sup> *Sexton v. Chicago Storage Co. et al.*, 30 Ill. App. 95.

<sup>2</sup> *Smith et al. v. McLean et al.*, 22 Ill. App. 451.

<sup>3</sup> *Stow v. Russell et al.*, 36 Ill. 18.

<sup>4</sup> *Grommes et al. v. St. Paul Trust Co. et al.*, 47 Ill. App. 568.

<sup>5</sup> *Seem v. McLees*, 24 Ill. 193; *Fink et al. v. Disbrow*, 69 Ill. 76.

§ 172. **Test questions.**— But many questions arise which deserve most careful examination on part of the defendants—for example :

Has the suit been commenced by the party entitled to the possession?

Has the suit been commenced against one tenant when the letting was to two or more?

Has the suit been commenced by a tenant in common against his co-tenant, when the plaintiff is not entitled to the exclusive possession of the premises?

Did the relation of landlord and tenant exist between the parties? If so, has that relation been terminated, and when and how?

Did the plaintiff, prior to the entry charged, disclaim to defendant all interest in the premises? Is the defendant, in fact, on the premises?

In cases where demand of possession is required, was the demand made for possession of the premises, and was that demand what the law requires? Was it served as the statute provides?

And on this question special attention is called to the case of *Doran v. Gillespie*, 54 Ill. 366, where the doctrine is fully laid down, that the defendant is not guilty in this action until the demand has been made as required ; and defects in the demand are not waived by the defendants appearing and going to trial, although the defects in the summons may be thus waived.

Again, have the premises been described with reasonable certainty in the complaint? Has the proof on the trial sustained the description given in the complaint?

Has the description in the complaint included the entire premises in question?

Do the premises described in the complaint correspond with those described in the demand, in cases where demand was necessary?

Such inquiries and others suggested by the facts of each particular case arising under the various clauses of the statute, will lead to the detection of weaknesses in the plaintiff's case, that will prove fatal to it in many instances.

In an action of forcible entry and detainer, the defendant may prove, that prior to the entry the plaintiff disclaimed to him all interest in the premises, which, if proven, constitutes a defense to the action.<sup>1</sup>

Estoppels in *pais*, affecting permanent interest in land, can only be made available in courts of justice and cannot be used as a defense in an action of forcible entry and detainer.<sup>2</sup>

#### *Increased Rent—Tenant's Duty.*

Where a tenant was notified by the landlord before the expiration of his term that he could have the premises no longer, unless he took the entire premises and paid his certain price for the same, as rent, and the tenant held over and occasionally did use the entire premises, but objected to the new terms sought to be imposed; he became liable to pay for the whole premises, it being presumed that he finally acceded to the new terms imposed.<sup>3</sup>

<sup>1</sup> Dudley et al. v. Lee, 39 Ill. 339.

<sup>2</sup> B. & O. & C. R. R. Co. v. Ill. Cent. R. R. Co., 137 Ill. 9.

<sup>3</sup> Griffin v. Knisely, 75 Ill. 411.

A notice by the landlord to the tenant, that if he continues to occupy beyond the present term he must pay increased rent, will not bind the tenant, though he holds over, unless he consent to the increased rent.

Where a tenant has received notice that he must pay increased rent if he remains in possession, and expressly declines to pay said increase and holds over, the remedy of the landlord is to oust him from possession. If he permits him to remain, the tenant still refusing to pay the increased rent, he can recover only the rent as based on the former lease.

Where a landlord gives notice to his tenant, that if he occupies beyond the present term he will be required to pay an increased rent, the silence of the tenant after receiving such notice will be construed into an assent or agreement to occupy at the increased rent. But where the tenant refused to assent to the increase, no such presumption arises.<sup>1</sup>

**§ 173. Tenant's right to abandon premises.**— But if the tenant, having the right to abandon the premises, remains in possession for any considerable time after his knowledge of the landlord's failure to repair, he thereby waives his right to abandon the lease.<sup>2</sup>

If the landlord agrees to make repairs before the possession is to be given to the tenant, the making of such repairs is a condition precedent and an entry by the tenant before the making thereof is not a waiver; and the tenant's entry before the stipulated day is no waiver on

<sup>1</sup> Galloway v. Kirby, 9 Ill. App. 501.

<sup>2</sup> Lunn v. Gage, 37 Ill. 19; Wright v. Lattin et al., 38 Ill. 293; Keenan v. Germain, 61 Miss. 498.

his part, and rent is not recoverable if the tenant elects to abandon the contract.<sup>1</sup>

<sup>2</sup> Where a lessor rents a room in a building for a store-room, undertaking to keep the building, except the particular room, in proper repair, and neglects to repair, so that the roof of the building leaks so badly as to render the store-room unfit for the use for which it is rented, and the lessee leaves the same on that account, the lessor will not be entitled to recover rent for the store-room for the time after it is abandoned.<sup>2</sup>

<sup>1</sup> *Stohecker v. Barnes*. 21 Ga. 430.

<sup>2</sup> *Bissell v. Lloyd et al.* 100 Ill. 214.



## CHAPTER XVII.

### REPAIRS.

SECTION 174. Time when repairs made.

175. The common law rule as to repairs.

176. The landlord's duties regarding repairs.

177. What repairs made by tenant.

178. Damages for personal injury on account of premises being dangerous.

179. Damages by water.

180. Defective plumbing and the results of sewer gas.

### USE AND OCCUPATION.

181. When tenants liable for use and occupation.

182. Actions for rent and for use and occupation.

183. Set-off and recoupment.

184. Recoupment against rent.

185. Set-off—when allowed.

186. Damages.

187. Damages for failing to repair.

188. Re-entry by landlord.

§ 174. **Time when repairs made.**—When a landlord covenants to make repairs and no time is specified in which to make them, he must make them within a reasonable time, so that the lessee may have the benefit of them.<sup>1</sup>

The law implies, in a lease, covenants against paramount title and against such acts of the landlord as destroy the beneficial enjoyment of the premises.<sup>2</sup>

It is the duty of the tenant, where the landlord has

<sup>1</sup> Lunn v. Gage, 37 Ill. 19.

<sup>2</sup> Wade v. Halligan, 16 Ill. 507.

covenanted to repair the buildings upon the premises, to notify him of the need of such repair.<sup>1</sup>

But no notice is required if the landlord covenants to repair at or before a certain time.<sup>2</sup>

If the lessor covenants to repair before the commencement of the term, the making of such repairs is a condition precedent to the payment of rent.<sup>3</sup>

§ 175. **The common law rule as to repairs.**—The lessee was bound, at common law, to make, during his term, what are called “tenantable repairs,” not “substantial, lasting or general repairs, but only such ordinary repairs as were necessary to prevent waste and decay of the premises. If a window in a dwelling should blow in, the tenant could not permit it to remain out, and the storms to beat in and greatly injure the premises, without liability for permissive waste; and if a shingle or board on the roof should blow off or become out of repair, the tenant could not permit the water, in time of rain, to flood the premises, and thus injure them, without a similar liability. He being present, a slight effort and expense on his part could save a great loss; and hence the law justly casts the burden upon him.”

The duties in respect to repairing may be regulated by express agreement, or in the absence of agreement will be in accordance with what the law implies from the relation of landlord and tenant.

§ 176. **Landlord's duties regarding repairs.**—A landlord does not insure that nothing exists touching the

<sup>1</sup> Wolcott v. Sullivan, 6 Paige (N. Y.), 117.

<sup>2</sup> Gerzebech v. Lord, 33 N. J. L. 240.

<sup>3</sup> Hickmar v. Rayl, 55 Ind. 551.

premises in question that will interfere with the health or comfort of his tenant, nor is he bound to repair, unless the lease so provides.<sup>1</sup>

A landlord is not responsible for personal injuries caused by a neglect to repair, when the defective condition of the premises arises during the tenancy.<sup>2</sup>

A tenant bound to restore premises in good order, "loss by fire, inevitable accident or ordinary wear excepted," is obliged to repair a window broken by a stone accidentally kicked by a passing team.<sup>3</sup>

A landlord is liable to his tenant in possession for injuries caused by him through negligence in making repairs.<sup>4</sup>

Where the lessee of a store-room in a building undertakes to make all needed repairs and alterations in and about such room, the lessor, by implication, will be bound to keep the residue of the building in repair, so as to protect such room.<sup>5</sup>

The legal effect of a covenant in a lease by the lessee to keep the demised building in repair at his own expense and to deliver it up at the end of his term in as good order and condition as when he received it, without any exception of loss by fire, is, that in case the building is burned, the lessee will rebuild the same, and such loss will not even stop the rent until the building is replaced.<sup>6</sup>

A lease stipulated, that repairs upon the premises were

<sup>1</sup> McCoull v. Herzberg, 33 Ill. App. 542.

<sup>2</sup> Borman v. Sandgren, 37 Ill. App. 160.

<sup>3</sup> Peck v. Scoville Mfg. Co., 43 Ill. App. 360.

<sup>4</sup> Mitchell v. Plaut, 31 Ill. App. 148.

<sup>5</sup> Bissell v. Lloyd et al., 100 Ill. 214.

<sup>6</sup> Ely v. Ely et al., 80 Ill. 532.

to be made for a certain amount, which were to be paid for by the lessee and to be allowed on the accruing rent. The mechanic who made the repairs performed work above the amount stipulated in the lease, but upon the request of the lessee. Held: that the lessee was liable for such excess.<sup>1</sup>

A lease for a portion of a building leaves the responsibility for what is not demised upon the landlord.<sup>2</sup>

Where a landlord covenants to repair before the term commences, but the tenant enters upon the term and receives possession before such covenant is performed, he cannot abandon the lease and refuse to pay the rent for the breach of any other covenant than for quiet enjoyment.<sup>3</sup>

Where a landlord covenants in a lease to keep the roof in good repair, the tenant in an action against him should have been permitted to show damages sustained by the leaking condition of the roof, and he would be entitled to recover in said action all legitimate damages sustained by breach of the covenant to repair. His right to recover substantial damages is not affected by the fact that the tenant had sublet the premises to one who had paid him the same rent agreed for in the lease.<sup>4</sup>

Where a lease binds the lessee to pay rent during the term, the rent will not stop while the premises are receiving repairs, nor is the tenant relieved from paying rent because the premises are injured by accident during the term.<sup>5</sup>

<sup>1</sup> Benjamin v. Heeney et al., 51 Ill. 492.

<sup>2</sup> Payne et al. v. Irvin, 44 Ill. App. 105.

<sup>3</sup> Wright v. Lattin et al., 38 Ill. 293.

<sup>4</sup> Watson et al. v. Hooton, Exr., 4 Ill. App. 294.

<sup>5</sup> Peck v. Ledwidge, 25 Ill. 109.

§ 177. **What repairs made by tenant.**—As a general rule, the occupant of premises is responsible for injuries received in consequence of a failure to keep them in repair.<sup>1</sup>

Unless there was an express agreement on the part of the landlord to repair, the tenant must take the premises as he finds them and he cannot recover for repairs or damages sustained by reason of the want of repair.<sup>2</sup>

An agreement by the landlord to pay the tenant for repairs will not stop the running of the rent while the repairs are being made.<sup>3</sup>

Where the landlord, in violation of his covenant, fails to make repairs, the tenant may make them himself, charging the expense against the landlord, or sue for damages for breach of covenant.<sup>4</sup>

§ 178. **Damages for personal injury on account of premises being dangerous.**—Where a landlord rents premises in a ruined and dangerous condition and the injury results therefrom to a third person, the landlord is liable. Suffering the premises to be constructed or to become in a dangerous condition is a nuisance, and if the landlord demise the premises in that condition he is liable for injuries arising therefrom.<sup>5</sup>

As a general rule is, as stated, that the tenant is responsible for injuries arising from a failure to keep the

<sup>1</sup> The C. C. Stove Co v. Wheeler, 14 Ill. App. 112.

<sup>2</sup> Smith v. Kinkaid, 1 Ill. App. 620.

<sup>3</sup> Peck v. Ledwidge, 25 Ill. 109.

<sup>4</sup> McFarlane v. Pierson, 21 Ill. App. 566.

<sup>5</sup> Reichenbacher v. Pahmeyer, 8 Ill App. 217.

premises in a proper state of repair; but when the premises are let with a nuisance upon them, by means of which the injury complained of is received, the owner or landlord will be liable.<sup>1</sup>

The tenant in possession, and not the landlord, is responsible to third persons for injuries occasioned by failure to keep the demised premises in repair, unless the owner has agreed to keep them in repair, or when the premises were let with the alleged nuisance upon them, in which case the owner, and not the tenant, is responsible for injuries caused by the nuisance.<sup>2</sup>

The landlord, however, is liable where he has expressly agreed to keep the premises in repair and where the premises are let with a nuisance upon them.<sup>3</sup>

To the rule that the occupant is liable for injuries, there are two exceptions: *Firstly*, where the landlord, by express covenant, agrees with the tenant to keep the premises in repair; and *secondly*, where the premises are let with a nuisance upon them which caused the injury.<sup>4</sup>

The owner of property is not liable for injuries resulting from an improper use by a stranger of the property, acting without his authority.<sup>5</sup>

If a tenant uses the premises in such a manner as to create a nuisance, the landlord has a right to abate it.<sup>6</sup>

To entitle a tenant to come into a court of equity in the first instance, for equitable relief against a private

<sup>1</sup> Tomle v. Hempton, 129 Ill. 379.

<sup>2</sup> City of Peoria et al. v. Simpson, 110 Ill. 294.

<sup>3</sup> Gridley v. City of Bloomington, 68 Ill. 47.

<sup>4</sup> The U. B. Mfg. Co. v. Linsay, 10 Ill. App. 583.

<sup>5</sup> Greene et al. v. Hague, 10 Ill. App. 598.

<sup>6</sup> Kurrus v. Seibert, 11 Ill. App. 319.

nuisance, he must have a clear case; there must be "a strong and mischievous case of pressing necessity."<sup>1</sup>

§ 179. **Damages by water.**—There is no implied contract on the demise of real estate that it shall be fit for the purpose for which it was let; and in the absence of an express contract to keep the premises in repair, the landlord cannot be made liable for damages to the tenant caused by water from an upper floor.<sup>2</sup>

Where the water pipes in a building are of the proper size and properly constructed, a tenant occupying a room and having the use of the pipes and water and access to a crank by which to turn off the water to prevent freezing, and who neglects to turn off the same, whereby it freezes and bursts the pipe and damages his goods by leakage, cannot maintain an action against the landlord for damage, on account of his own negligence and want of ordinary care in not turning off the water when likely to freeze. A clause in a lease exempting the landlord from liability for damage to the tenant by leakage of water, will not only be held to apply to leakage in the story or room occupied by the tenant, when it appears that the water pipes are in a room or the floor above, and to which the tenant has access and which he agrees to keep in order, but will also apply to leakage from the pipes in such upper rooms rented to other parties.<sup>3</sup>

To make the landlord liable to his tenant for such injuries, it must be shown that the agencies causing the damage were under the control of the landlord or his

<sup>1</sup> Oswald v. Wolf, 129 Ill. 200.

<sup>2</sup> Mendel v. Fink, 8 Ill. App. 378.

<sup>3</sup> Taylor v. Bailey, 74 Ill. 178.

agent, and that the damages arose by negligence or unskillful use of such agencies.<sup>1</sup>

If water pipes supply water to the portion of the building let and the lessor turn the water off and prohibit the lessee from turning it on, the latter may, at his election, remain in possession and recover damages, or entirely abandon the premises and the lease. But a lessee who takes possession of premises which have a defective water pipe (there being no agreement in the lease concerning the matter) can recover nothing for damages resulting to him in consequence of the defective pipe.

The common lessor is not responsible to the lessee of one part of the lessor's building if this lessee suffer injury from the lessee of another part of the building.

A landlord is answerable, as occupant, not as landlord, if, while occupying a portion of his building, he cause injury by his negligence to the lessee of another portion. He is liable for damage unnecessarily inflicted on the lessee in the operation of repairing, *Dutton v. Holden*, 4 Wend. R. 643; or if the repairing be performed unskillfully and negligently. *Turner v. McCarthy*, 4 E. D. Smith R. 247. See, also, *White v. Mealio*, 63 N. Y. R. 609.

**§ 180. Defective plumbing and the results of sewer gas.**—The landlord is not bound, under the penalty of fraud, to disclose defects in the plumbing of a building, even if they are known to him.<sup>2</sup>

It is the duty of the tenant, upon the discovery of

<sup>1</sup> *Greene v. Hague*, 10 Bradw. 598; *Mendel v. Fink*, 8 Bradw. 378. *Taylor v. Baily*, 74 Ill. 178.

<sup>2</sup> *Blake v. Rahous*, 25 Ill. App. 486.



fraudulent representations which induced the making of the lease, to rescind at once, if he desires to escape its obligations. Failing to do so, he must abide the lease.<sup>1</sup>

If fraudulent representations are made to the tenant before the execution of a lease, that the premises are free from sewer-gas, and he moves in and finds the premises so infected by sewer-gas as to be injurious to health, it is the duty of the tenant, if he wishes to rescind the contract, to do so immediately and leave the premises.<sup>2</sup>

The law does not imply a contract on part of the landlord that the premises are tenantable or that they will continue so during the term.<sup>3</sup>

The landlord is not bound, in the absence of a contract imposing that duty upon him, to keep the buildings safe for his tenants, nor to protect them from intruders.<sup>4</sup>

If the lessor fail to perform his agreement, the lessee may maintain an action for damages, or, when sued for rent, may, by way of recoupment or counter-claim, interpose the default.

While the lessor's agreement cannot be made the subject of an action for specific performance, yet after giving reasonable notice and opportunity to carry out the agreement, the lessee, if the lessor persist in neglecting performance, may himself make the repairs and collect the expense from him. If the repairs required be considerable, the lessee may, instead of taking this course, claim

<sup>1</sup> Little et ux. v. Dyer, 35 Ill. App. 85.

<sup>2</sup> Morey et al. v. Pierce, 14 Ill. App. 91.

<sup>3</sup> McCoull v. Herzberg, 33 Ill. App. 542.

<sup>4</sup> Platt v. Farney, 16 Ill. App. 216.

from the lessor the difference in value of the premises as they are and as they would have been if in proper repair. While probable loss of business profits does not seem generally to form a proper claim for damages, yet, certain premises having been leased for a hotel and the lessor failing in his agreement to put them in repair, it was held that the loss of profits which might have been realized from letting rooms was recoverable.

*Use and Occupation.*

The action of assumpsit cannot be sustained for use and occupation of real estate unless the relation of landlord and tenant exists under a contract, express or implied; and a contract will not be implied, when another party expected payment of rent: thus, when an executor, during the settlement of an estate, allowed the father of the devisees to occupy land bequeathed to them, neither party expecting payment, they living with their father but never having had possession, nor the right of possession, it was held, that assumpsit would not lie against their father's estate for the use, and that nothing could be recovered for use and occupation.<sup>1</sup>

If one continues to occupy premises after notice from the owner that he will be expected to pay rent, he will be liable for use and occupation.<sup>2</sup>

Nor will action for use and occupation lie against a person in possession under a contract of sale; but if such contract is rescinded, the action may be sustained.<sup>3</sup>

<sup>1</sup> Clark v. Clark, 58 Ill. 527.

<sup>2</sup> Sanborn v. Haynes et al., 26 Ill. App. 335.

<sup>3</sup> McNair v. Schwartz, 16 Ill. 24; Dixon v. Haley, 16 Ill. 145; Vandehurell v. Storrs, 3 Conn. 203.

If a party holds possession against the will of the owner, the law will infer an implied agreement to pay a reasonable rent therefor.<sup>1</sup>

The action of assumpsit for use and occupation is founded upon contract and the relation of landlord and tenant must exist.<sup>2</sup>

Under a contract for rent for a year, commencing *in futuro*, where a lessee actually takes possession of the premises and occupies them, he will be liable for the use and occupation for the term, although the lease may be void under Statute of Frauds.<sup>3</sup>

**§ 181. When tenants liable for use and occupation.**

—If one continues to occupy premises after being notified by the owner, that if he does so he will be expected to pay rent, the occupant will thereby become liable to the owner for the use and occupation.<sup>4</sup>

A person lawfully withholding the premises is liable to the owner for their reasonable rental, estimated at the time the liability arises, and he takes upon himself the risk of an unfavorable season.<sup>5</sup>

Where a tenant occupying the land under a parol lease holds over without any new agreement as to rent after the expiration of his term and after the sale of the land by his landlord, such holding over will be considered to be a holding over under the terms of the lease and the same rate of rent may be recovered from the tenant by

<sup>1</sup> Oakes v. Oakes, 16 Ill. 106.

<sup>2</sup> Sanborn v. Haynes et al., 26 Ill. App. 335.

<sup>3</sup> Smith v. Kinkaid, 1 Ill. App. 620.

<sup>4</sup> Ill. Cent. R. R. Co. v. Thompson, 116 Ill. 159.

<sup>5</sup> Gilliam v. Coon et al., 10 Ill. App. 43.

the vendee of the landlord in an action of assumpsit for use and occupation.<sup>1</sup>

**§ 182. Actions for rent and for use and occupation.**

—Actions by landlords against tenants are in some instances brought to recover rent, in other instances, to recover compensation for the use and occupation of the premises.

“The legal acceptance of *debt*,” remarks Blackstone, “is a sum of money due by certain and express agreement, as by a bond for a determinate sum; a bill or note; a special bargain; or a rent reserved in a lease; where the quantity is fixed and specific and does not depend upon any subsequent valuation to settle it. The non-payment of these is an injury, for which the proper remedy is by action of *debt* to compel the performance of the contract and recover the specific sum due.”<sup>2</sup>

The rent which is to furnish the measure of damages must be something in the nature of an annual, or at least regular, periodical payment, not some single payment, made, or agreed to be made, under such circumstances that no inference can properly be drawn of intention, or contract, to make another similar payment. Nor will former rent create any liability for the future, after the term to which it had relation has expired, if the rent was paid or agreed to be paid by some person who, in the absence of special contract to pay rent or compensation for occupation, would be entitled to occupy the premises free of charge. Thus, one tenant in common who has hired for a certain term, and at a certain rent, his co-ten-

<sup>1</sup> Price v. Pittsburgh & F. W. & C. R. R. Co., 34 Ill. 13.

<sup>2</sup> 3 Bl. Comm. p. 154.

ant's moiety of the common property, is not liable for use and occupation, if he continue in possession when the term has elapsed, unless there be evidence that he holds as a tenant, since, in the absence of evidence to the contrary, he is deemed to be in possession by his right as owner.

§ **183. Set-off and recoupment.**—The law does not permit a set-off except where the demands of both parties are liquidated or are capable of being ascertained by calculation.<sup>1</sup>

A surety for the tenant may set up, in defense to an action against him, any matter that operates as a discharge of the tenant from liability upon the lease. But the landlord must create a new tenancy, by agreeing to accept the sub-tenant or assignee of the lessee in substitution for the original lessee, before the latter will be discharged, and before the sureties of the latter will be discharged.<sup>2</sup>

A recovery of judgment for rent, with satisfaction of the judgment, or, perhaps, even recovery alone, will form a bar to an action for any rent which had accrued on the lease, and might properly have been included in the action in which the judgment was recovered.<sup>3</sup>

§ **184. Recoupment against rent.**—A tenant will not be allowed credit against the rent for improvements made on the demised premises in excess of the amount agreed on by the landlord, unless the landlord afterwards ratifies and approves the same.<sup>4</sup>

<sup>1</sup> Taylor, Landlord and Tenant, sec. 374.

<sup>2</sup> Grommes et al. v. St. Paul Trust Co. et al. 147 Ill. 634.

<sup>3</sup> Jex v. Jacob, 19 Hun (N. Y. S. C.), R. 105.

<sup>4</sup> Herrell et al. v. Sizeland et al., 81 Ill. 457.

It seemed to be the theory of the ancient law, that the covenants on part of the landlord to repair and the covenants as to the tenancy were independent of each other; that the tenant could not set off in a cross action the amount of damage sustained by him against a demand for rent, because the rent was a fixed, certain amount and the damages on account of broken covenants to repair were uncertain.<sup>1</sup>

But now it is a generally recognized principle, that a defendant need not resort to a cross-action on a plaintiff's contract of indemnity in any case, but may set up his damages or counter claim by way of reducing the plaintiff's demand. Where the demands of both parties issue out of the same contract or transaction, the defendant is allowed a right to recoup; that is, to keep back something that is in fact due, because there is an equitable reason why it should be withheld, although the damages on both sides are unliquidated.<sup>2</sup>

An executory lease under seal cannot, without a new consideration, be changed by parol so as to form the basis of an action, or for recoupment.<sup>3</sup>

**§ 185. Set off—when allowed.**—If the landlord fail to repair according to his covenant, the tenant may recoup from the rent or may sue upon the covenant; but in that case his possession remains undisturbed, the breach of the covenant hindering more commodious enjoyment of the term, whilst, in case of eviction, the term is gone, or the property so situated that it

<sup>1</sup> Watts v. Coffin, 11 Johns. 495.

<sup>2</sup> Ives v. Van Eppes, 22 Wend. 165.

<sup>3</sup> Reeves v. Hyde, 14 Ill. App. 233.

ceases to be useful for the purpose for which the term was obtained.<sup>1</sup>

In an action on a lease against the tenant to recover damages for a breach of the lease, the defendant may introduce, by way of recoupment under the general issue, evidence to show that the plaintiff had represented the roof to be in good condition, but that it was leaky and the defendant's goods were injured in consequence.<sup>2</sup>

**§ 186. Damages.**—There is nothing in the forcible entry and detainer act authorizing the court to render a judgment for money or damages.<sup>3</sup>

Damages cannot be allowed in an action of forcible entry and detainer.<sup>4</sup>

Under the common law, a party was liable to indictment, and might be convicted of either a forcible entry or a forcible detainer, each being considered a distinct criminal offense. But under the statute, the action is entirely a civil remedy, and the sole object that can be gained by it, is the possession of the premises wrongfully withheld.

Damages are not recoverable in this action, and the only judgment that can be rendered for the plaintiff is the restitution of the premises of which he has been unjustly deprived.<sup>5</sup>

A jury, in an action of forcible entry and detainer, having rendered a verdict finding the defendant guilty,

<sup>1</sup> Wright v. Lattin et al., 38 Ill. 293.

<sup>2</sup> Stubblefield v. Soule, 21 Ill. App. 154.

<sup>3</sup> Gould et al. v. Hendrickson, 9 Ill. App. 171.

<sup>4</sup> Brush v. Fowler, 36 Ill. 53.

<sup>5</sup> Robinson v. Crummer, 5 Gilin. 222; Mason v. Finch, 1 Scam. 495.

and assessing plaintiff's damages at one cent, the court held: "As to the verdict for one cent damages, though damages cannot be allowed in such action, we will not reverse the judgment for that cause, the merits being so clearly with the appellee."<sup>1</sup>

But damages suffered from negligent performance by the lessor of some work about the premises, which work was done for the benefit of the lessor by lessee's permission, not by virtue of the lease, and which work the lessor had promised to do "with diligence, care and caution," would constitute such a counter-claim.

Breach of a covenant in the lease might, at common law, be recouped. *Tone v. Brace*, Cl. R. 503, 510, S. C., 8 Paige, R. 597, 599. *Special* damages have been said not to be the subject of recoupment. *Benkard v. Babcock*, 2 Robt. R. 175, 182.

In an action by the landlord for rent, the lessee may recoup damages arising from a leasing of contiguous parts of the premises for the sale of liquor, contrary to the agreement, and in such case, exemplary and punitive damages may be recovered.<sup>2</sup>

Evidence of damages occasioned to the tenant by being prevented from removing from the demised premises, a house thereon belonging to her, for the purpose of recouping the damages thus sustained from the rents, was properly excluded.<sup>3</sup>

<sup>1</sup> *Brush v. Fowler*, 36 Ill. 53; *Gould v. Hendrickson*, 9 Bradw. 171; *Walker v. Shoemaker*, 4 Hun. (N. Y. S. C.), R. 579. See *Crane v. Hardman*, 4 E. D. Smith, R. 339. Compare *Cram v. Dresser*, 2 Sandf. R. 120.

<sup>2</sup> *Chicago Legal News Co. v. Browne et al.*, 5 Ill. App. 250.

<sup>3</sup> *Keegan et al. v. Kinnare*, Admx., 123 Ill. 280.



An agreement in a lease to pay so much per day as liquidated damages for each day the possession is withheld after the terms of lease by lapse of time, is valid and not to be treated as a penalty.<sup>1</sup>

Where a lot is rented only for the purpose of building cribs on it in which to store corn, the lessee will be responsible to the lessor for any tortious acts committed by the tenant outside of such use, resulting in injury to the premises.<sup>2</sup>

A justice of the peace has jurisdiction in a suit for damages to real estate done by a party entering the same under a lease, and the owner may recover for the same without being in actual possession at the time of the injury.<sup>3</sup>

In an action brought for the recovery of rent, damages claimed by the tenant for injuries to his stock through a choked water-pipe were properly admitted.<sup>4</sup>

The failure of a landlord to carry out an agreement to repair is a matter of defense in an action for rent, and damages suffered by reason thereof may be recouped therefrom.<sup>5</sup>

In order to make a landlord liable to his tenant for injuries from water from an upper floor, it must be shown that agencies causing damages were under the management of his landlord or the latter's agent; that the damage arises by reason of the unskillful uses of such agencies.<sup>6</sup>

<sup>1</sup> Poppers v. Meager, 47 Ill. App. 593.

<sup>2</sup> Taylor et al. v. Koshetz, 88 Ill. 479.

<sup>3</sup> Taylor et al. v. Koshetz, 88 Ill. 479.

<sup>4</sup> Mitchell v. Plaut, 31 Ill. App. 148.

<sup>5</sup> Clark v. Ford, 41 Ill. App. 199.

<sup>6</sup> Mendel v. Fink, 8 Ill. App. 378.

If the lessee has suffered damage by reason of the failure of the lessor to complete the building within the time agreed upon, such damage may be recouped in a proceeding for the recovery of the rent to the extent of the rent; and if the damage exceeds that amount, the excess may be recovered over in the same proceeding.<sup>1</sup>

**§ 187. Damages for failing to repair.**—If, a valid contract for leasing having been entered into, the lessor fail to complete his contract by delivering the lease, the lessee, may, if its delivery be practicable, enforce delivery by an action for specific performance, or he may content himself with an action for damages only.

The measure of damages in the case of a lessor able to complete the contract, yet perversely refusing, will include the value of the lessee's bargain, and any special damage actually resulting to him from the lessor's violation of contract. But if the lessor find the agreement to be one which, through some misfortune, or on account of some mistake, he is unable to perform, nominal damages only will doubtless be recoverable.

Some cases of fraud seem to entitle the lessee after entry as well to rescind as to maintain an action for damages. Thus, a landlord leasing premises with knowledge of their being infected by disease and concealing this fact from the lessee, will be liable in damages to the lessee, if the latter contract the disease. The right of rescinding the lease appears in such a case of premises being infected equally clear, even without the tenant contracting the disease.<sup>2</sup>

<sup>1</sup> *Haven & White v. Wakefield et al.*, 39 Ill. 509.

<sup>2</sup> *Jackson v. Odell*, 9 Daly R. 371; *Minor v. Sharon*, 112 Mass. R. 477; *Smith v. Marrable*, 11 M. & W. R. 5 pr., *Abinger L. C. B.* p. 9.

While the right to rescind for known fraud of the lessor is lost by entry, the right to recover damages resulting from fraud of the lessor affecting the value of the lease is not thus impaired. And these damages may be set up by way of counter-claim or recoupment in an action for rent.<sup>1</sup>

The assignee of a life estate in lands, subject to the payment of rent, is bound to pay the taxes assessed on the premises during his tenancy and cannot recoup or set off the same against the rent of the premises.<sup>2</sup>

### § 188. Re-entry by landlord.

*When re-entry by landlord determines lease.*—Where a lease contains a stipulation, that for any breach of the covenants by the lessee the lease shall “determine and be utterly void,”—that is to say, void at the election of the lessor,—an entry by the landlord will be regarded as an exercise of his option to determine the lease and he can not have a recovery for subsequently accruing rent.

*When re-entry by landlord does not stop the subsequent rents.*—Where the lease contains no provision that it shall become void for failure to pay rent, but provides that a re-entry and taking of possession by the landlord shall not have the effect of determining the lease nor operate to prevent its continuing in force, such re-entry for the non-payment of rent then due will not release the tenant from the payment of the subsequently accruing rent.

There is nothing illegal or improper in a covenant in a lease, that the obligation of the tenant to pay all the

<sup>1</sup> Whitney v. Allaire, 1 N. Y. R. 305-310.

<sup>2</sup> Prettyman v. Walston, 34 Ill. 175.

rents to the end of the term shall remain, notwithstanding there may be a re-entry for a default, and such an agreement may be enforced against the tenant and his sureties or guarantors.

*Right of re-entry—mode of entry.*—Where a lease authorizes a landlord to re-enter in case of default in the payment of rent, the fact that such entry is made after establishing the landlord's right to make the same by an action of forcible detainer, instead of making the same without a judgment of restitution, is no just ground of complaint.

It may not be strictly accurate to call the money to be paid after re-entry "rent," or to treat the lease as in force after re-entry; but the parties have the right to fix the amount of the rent to accrue, according to the terms of the lease, as the amount of damages to be paid by the tenant in case of a breach of his covenants. It can make but little practical difference whether the sum agreed to be paid be called rent or damages.<sup>1</sup>

<sup>1</sup> Grommes et al. v. St. Paul Trust Co. et. al. 147 Ill. 634.

## CHAPTER XVIII.

### FIXTURES.

#### SECTION 189. Definition.

190. Landlord's fixtures.

191. Tenant's fixtures.

192. Removing fixtures.

193. The intention as to fixtures.

194. Cases in illustration.

§ 189. **Definition.**—What are known as fixtures, are articles originally personal in their nature, which, in some manner, have been fixed or attached to the realty. Some articles, so fixed or attached by the tenant, he is entitled to remove; other articles, similarly circumstanced, he is obliged, at the end of his occupancy, to abandon to his landlord. Fixtures of this kind which the tenant may remove have been called “tenant’s fixtures;” those which he must resign to the landlord, “landlord’s fixtures.”

§ 190. **Landlord’s fixtures.**—While, by agreement between themselves, the landlord and tenant may arrange, to a great extent, what annexations the tenant may remove, yet there are held to be certain distinctions existing in the nature of things, according to which distinctions the transfer and devolution of property are regulated, and these distinctions contracting parties cannot abrogate. Such is the distinction between real and personal property. The separate articles and materials out of which the walls of a house have been constructed

become, by such use, real estate, and no arrangement among parties can convert them into mere chattels. A license concerning them may be given, but they cannot be made alienable as chattels, nor can the rules of succession of personal property be made applicable to them.

§ 191. **Tenant's fixtures.**—In the instance of covenants running with the land, we have seen the provisions of a statute limited by construction with reference to a principle somewhat analogous.

Any articles, however, which have been attached to the realty, and which, in the absence of agreement, or of any special relation between parties interested, would become, by this attachment, a part of the realty, yet which, by the manner of attachment, “were not so absorbed or merged in the realty that their identity as personal chattels were lost,” may, under some circumstances, be personal property, and consequently removable, unless they cannot be removed “without practically destroying” them, or unless they be necessary to the support of something, part of the realty, with which they are connected.

Subject to the limitations mentioned, the principal test of the tenant's right to a fixture which he has placed is (in the absence of any express agreement) the intention with which he annexed the article, whether for the permanent and substantial improvement of the premises, or whether for a temporary object, or for his own mere convenience. As his interest is temporary, it will be presumed, where the presumption would not violate these limitations, that any article which he has attached was intended for his own convenience rather than for the improvement of the realty.

§ 192. **Removing fixtures.**—Fixtures which he will be deemed to have attached for his own use, and which he will be entitled to remove at the end of his occupancy, seem, in the instance of a tenant of a residence, to be such domestic fixtures as hangings, pier-glasses, chimney glasses, book-cases, carpets, blinds, and curtains, although they be physically attached to the premises. So it seems he may remove grates, ranges, and furnaces which he has placed. He may remove gas-fixtures he has affixed, but not gas-pipes.<sup>1</sup>

In an English case, where a tenant had arched over an open well, and erected a pump, which was attached to a stout perpendicular plank, resting on the ground at one end, and at the other fastened by an iron bolt or pin to an adjacent wall, from which it was distant about four inches, it was held that he had a right to remove the pump, for the reasons, as stated by one of the judges, that it was placed for domestic convenience by the tenant, was slightly fixed, and could be removed entire.<sup>2</sup>

Instances of articles attached by the tenant, whether they be properly fixtures or not, which articles, when once annexed to the premises, are considered as having been placed for the benefit of the property, are doubtless afforded by new locks placed upon doors, and new keys purchased for locks already on.<sup>3</sup> But a padlock placed by the tenant, not to replace one which had previously been placed by the landlord or former occupant, may, it has been said, in a Massachusetts case, be removed

<sup>1</sup> *McKeage v. Hanover F: Ins. Co.* 81 N. Y. R. 38.

<sup>2</sup> *Grymes v. Boweren*, 6 Bing. R. 437.

<sup>3</sup> *Bishop v. Elliott*, 11 Ex. R. 113; *Elliott v. Bishop*, 10 Ex. R. 496.

by the tenant.<sup>1</sup> It has been held in an English case that a box border, planted in a garden by the tenant, is to be considered “a thing intended to be permanent,” which, therefore, may not be removed, and this was said, in the same case, to be the law concerning flowers planted “in the ground.”<sup>2</sup>

As between landlord and tenant, improvements put on the demised premises by the latter for purposes of trade or manufacture, and which can be detached without injury to the estate, may be removed by him before he quits the possession.<sup>3</sup>

It is not necessary that a chattel should always be fastened or attached to the realty to make it part of the real estate.<sup>4</sup>

§ 193. **The intention as to fixtures.**—The intention of the parties as to the uses and purposes to which a chattel is put, is the criterion in deciding whether it is part of the realty, or not.<sup>5</sup>

A mirror built on the chimney breast in keeping with the finish of the rest of the room, and so attached on the chimney front that it could not be removed without tearing away a portion of the plastering, was decided to be part of the realty and pass by the deed of the land.<sup>6</sup>

<sup>1</sup> Whiting v. Brastow, 4 Pick. R. 310.

<sup>2</sup> Empson v. Soden, 4 B. & Ad. R. 655. See Rules of the Roman Civil Law, Instit. Lib. 11. T. 1, §§ 31, 32.

<sup>3</sup> 2 Kent's Com. 343; Mason v. Fenn, 13 Ill. 525.

<sup>4</sup> Otis v. May, 30 Ill. App. 581; Jones on Mortgages, sec. 446; Jenney v. Jackson et al., 6 Ill. App. 32; Thielman et al. v. Carr et al., 75 Ill. 385; Palmer v. Forbes, 23 Ill. 301; Arnold v. Crowder, 81 Ill. 56.

<sup>5</sup> Otis v. May, 30 Ill. App. 581.

<sup>6</sup> Spinney v. Barbe, 43 Ill. App. 585.



§ 194. **Cases in illustration.**—A bar, counter and shelf placed into a building by a tenant for the purpose of conducting a saloon and attached to the realty so that they can be removed without injury to the premises, are trade fixtures and do not pass with the realty.<sup>1</sup>

In order that the fixtures of a cigar-stand in a hotel may retain the character of removable trade fixtures, it is necessary, upon the expiration of each tenancy of the house, that such right be duly asserted.<sup>2</sup>

Distillery pipes and machinery are trade fixtures and may be removed by the tenant, who has erected or bought them, at any time while he is in possession.<sup>3</sup>

Where a tenant has a right to remove certain fixtures from the premises, he should do so before he gives up possession to the landlord; for if the tenant leaves the premises without removing them and the landlord takes possession, the fixtures so left become the property of the landlord.<sup>4</sup>

Trover will not lie for fixtures while still annexed.<sup>5</sup>

<sup>1</sup> *Berger v. Hoerner*, 36 Ill. App. 360.

<sup>2</sup> *Leman et al. v. Best et al.*, 30 Ill. App. 323.

<sup>3</sup> *Moore v. Smith*, 24 Ill. 513.

<sup>4</sup> *Donnelly v. Thieben*, 9 Bradw. 495; *Wood's Landlord and Tenant*, sec. 532.

<sup>5</sup> *Leman et al. v. Best et al.*, 30 Ill. App. 323.

## CHAPTER XIX.

## DISTRESS FOR RENT.

SECTION 195. Rent defined.

196. The warrant for distress.

197. Proceedings for distress.

198. Distress warrant subject to lien of execution already levied.

199. Interest of chattel mortgagee.

200. What property subject to levy.

201. Amount claimed by landlord limits his recovery.

202. The office of the warrant.

203. The landlord's lien on crops.

204. Trial in distress cases.

205. Cases in illustration.

206. Practice in distress-for-rent cases.

§ 195. **Rent defined.**—Blackstone describes “rent” as being “a certain profit issuing yearly out of lands and tenements.”<sup>1</sup>

Again it is described as the recompense for the use and occupation of lands; but it is not confined closely to the compensation for the use of land, for chattels are often demised with the land and form no inconsiderable portion of the consideration for which rent is paid.<sup>2</sup> And Bingham says “rent is the compensation to the proprietor of land for the right to enjoy his land and the right to enjoy its annual profits.”<sup>3</sup>

It must be certain in amount and nature, but that it is

<sup>1</sup> 2 Black. Com. 41.

<sup>2</sup> Lathrop v. Clewiss, 63 Ga. 282; Toler v. Seebrook, 39 Ga. 14.

<sup>3</sup> Bingham on Real Estate, 557.

such, that it may be reduced to certainty, will suffice. It must be a profit, but not necessarily money—it may be payable in other articles, or by the performance of personal services. So, too, it must issue yearly, but may be payable annually or every second or third year.

While rent will, of course, become due on the day when, by the lease, it has been made payable, yet, as the tenant is allowed the whole of this day to pay, no action for the rent, if unpaid, can properly be commenced until the following day. If the time for payment be alternative, as “quarterly *or* monthly,” the election belongs to the landlord.

Rent reserved payable in advance, will become due and may be demanded accordingly. The notion entertained by some, that rent cannot be collected until the end of the month because the tenant has not enjoyed the premises, is a mistake; if required by the lease to be paid in advance, it can be demanded and collected.

If no express agreement concerning amount of rent has been made, the landlord, if the lease be not under seal, may recover the reasonable value of the use of the premises.

The weight of authority as to place of payment of rent seems to be that, whether payable in money, in kind, or in services, the premises let are the place of payment, in the absence of any agreement to the contrary.<sup>1</sup>

Where premises are demised for a year or a greater or other definite period, the rent will be payable at the end

<sup>1</sup> Van Rensselaer v. Jones, 5 Denio. R. 449, 453; Walter v. Dewey, 16 Johns. R. 222; Livingston v. Miller, 8 N. Y. R. 283, per Gardiner. J., p. 289; S. C. 11 N. Y. R. 80. Remsen v. Conklin, 18 Johns. R. 447.

of the year or other time fixed for the termination of the tenancy, unless the lease provides that it shall be payable at some particular time or unless a general custom at the place where the premises are situated fixes the time.<sup>1</sup>

Where, by the terms of a lease or contract of renting, rent becomes due before the expiration of the term, the landlord is authorized to distrain when the rent becomes due, and is under no obligation to wait until the expiration of the term.<sup>2</sup>

The statute giving the tenant in a distress for rent the right to avail of a set-off, was intended to apply only to cases where, upon a fair adjustment of all counter-claims other than the rent, the landlord will be indebted to the tenant, and in such case gives the tenant the benefit of his claim on such balance.<sup>3</sup>

**§ 196. The warrant for distress.**—In a levy of a distress warrant, where the warrant is insufficient and the levy by distress fails on that account, yet the landlord may recover a judgment for the rent where there was a personal appearance and defense to the merits, even though the levy of the distress warrant was not sufficient.<sup>4</sup>

The taking of other security is not a waiver of the landlord's right to distress for rent; he may pursue both remedies at the same time.<sup>5</sup>

<sup>1</sup> *Toler v. Seebrook*, 39 Ga. 14; *Ridgley v. Stilwell*, 27 Mo. 128; *Dixon v. Niccolls et al*, 39 Ill. 372.

<sup>2</sup> *Atkins v. Byrnes*, 71 Ill. 326.

<sup>3</sup> *Cox v. Jordan*, 86 Ill. 560.

<sup>4</sup> *Holley et al. v. Metcalf*, 12 Ill. App. 141.

<sup>5</sup> *Cunnea v. Williams*, 11 Ill. App. 72.

Where, after the levy of a distress warrant, property is disposed of by the landlord contrary to the statute, trover may be maintained by the tenant.<sup>1</sup>

Where the relation of landlord and tenant did not exist between appellant and appellee, there could be no distress for rent.<sup>2</sup>

Where a landlord deprives his tenant of possession of rented property, he cannot recover rent during the time the tenant is so deprived of possession, even if the lease has not yet terminated. There can be no distress for rent unless there has been an actual lease.<sup>3</sup>

Under the statute of Illinois, where the tenant abandons the demised premises, growing crops may be seized, whether the rent is due or not, but otherwise property cannot be taken under a distress warrant, except for rent due.<sup>4</sup>

**§ 197. Proceedings for distress.**—A description of the demised premises in a distress warrant is surplusage, and if inserted, can make no difference.<sup>5</sup>

Proceedings by distress warrant for the collection of rent are not governed by the practice affecting ordinary trials at law; the statute has only brought the landlord's right to sell the property distrained under the control of the court, but has not made the proceedings an original action. It is transferred to the court for the single purpose of ascertaining whether the relation of landlord and

<sup>1</sup> Sheetz v. Baker, 38 Ill. App. 349.

<sup>2</sup> Murr v. Glover et al., 34 Ill. App. 373.

<sup>3</sup> Murr v. Glover et al., 34 Ill. App. 373.

<sup>4</sup> First National Bank of Joliet v. Adam et al., 138 Ill. 483.

<sup>5</sup> Alwood v. Mansfield, 33 Ill. 452.

tenant exists, and what sum was due for rent when the goods were seized.<sup>1</sup>

In distress for rent, the lease need not be filed; no declaration is necessary.<sup>2</sup>

If the amount of rent is fixed by a distress for rent, it will be binding on the parties as to all matters that should have been determined in that proceeding.<sup>3</sup>

In a distress for rent, where the defendant pleads "no rent in arrears" only, the defendant cannot recover judgment for damages in his favor upon any state of proof. To authorize this, he must plead a set-off either specially or give notice thereof under the general issue.<sup>4</sup>

The action of replevin may be brought to try the legality of a distress for rent, provided there is no sum whatever due for rent; but if any sum, however small, is due and the distress is for a greater sum, or is excessive in regard to the quantity of goods taken, or otherwise irregular, the remedy must be by case.<sup>5</sup>

In a proceeding against the original tenant, the landlord cannot distrain the goods of the tenant's assignee, although they formerly belonged to the tenant and are found on the demised premises.<sup>6</sup>

To authorize a distress, the rent must be certain and specific; a landlord cannot apportion rent, so as to recover by distress, for the value of part of premises occupied, where the rent has not been fixed.<sup>7</sup>

<sup>1</sup> *Alwood v. Mansfield*, 33 Ill. 452.

<sup>2</sup> *Alwood v. Mansfield*, 33 Ill. 452.

<sup>3</sup> *Clevenger v. Dunaway*, 84 Ill. 367.

<sup>4</sup> *Cox v. Jordan*, 86 Ill. 560.

<sup>5</sup> *Hare v. Stegall*, 60 Ill. 380.

<sup>6</sup> *Howdyshell et al. v. Gary*, 21 Ill. App. 288.

<sup>7</sup> *Hatfield v. Fullerton*, 24 Ill. 278.

In an action of distress for rent, unless the warrant contains an allegation or charge that the defendant, by good husbandry, might have made a better crop, evidence to that effect is inadmissible.<sup>1</sup>

**§ 198. Distress warrant subject to lien of execution already levied.**—A distress warrant, issued and placed into the hands of the sheriff, after his receipt and levy of execution upon the goods and chattels of the tenant—not crops grown or growing upon the demised premises—does not take precedence of the execution, and a levy of the distress warrant will be subject to the prior liens of the execution.<sup>2</sup>

Where property is converted by the landlord, in a distress proceeding, such conversion does not necessarily become a matter of set-off, which must be interposed by the tenant in the distress suit, under penalty of losing his cause of action for the property so wrongfully converted.<sup>3</sup>

In an action of trespass by the tenant against his landlord for an illegal distress, the landlord may recoup to the extent of any rent unpaid, although the rent may not be due.<sup>4</sup>

Knowledge on part of the landlord that there was a chattel mortgage on goods, does not deprive him of the right of levying his distress, or subject him to punitive damages for so doing.<sup>5</sup>

**§ 199. Interest of chattel mortgagee.**—A mortgagor

<sup>1</sup> Bainter v. Lawson, 24 Ill. App. 634.

<sup>2</sup> Herron v. Gill, 112 Ill. 247.

<sup>3</sup> Sheetz v. Baker, 38 Ill. App. 349.

<sup>4</sup> Cunnea v. Williams, 11 Ill. App. 72.

<sup>5</sup> Mackin et al. v. Blythe, 35 Ill. App. 216.

in possession of mortgaged chattels has such an interest in the property as may be seized on execution or distress for rent.<sup>1</sup>

A person making a levy upon mortgaged goods in the possession of the mortgagor is not a trespasser in making such levy and neither replevin in the *cepit* nor trespass will lie for such taking.<sup>2</sup>

As the object of inquiry, on the trial of a distress for rent, is to ascertain the amount of rent due, any acts of the landlord impairing the value of the use of the demised premises may be shown and the damages caused thereby may be recouped.<sup>3</sup>

The right of the landlord to distrain for rent arises at common law and there can be no distraint unless there has been an actual demise at a certain fixed rent.<sup>4</sup>

A mere paper levy and placing a custodian on the land, but not in the house, is not sufficient in a distress for rent.<sup>5</sup>

§ 200. What property subject to levy.—A distress warrant can only be levied on personal property of the tenant.<sup>6</sup>

The landlord's lien is of common law growth and does not depend upon statutory enactment for its creation. Statutes have been enacted to regulate the right, but are rather in aid of than repugnant to the common law. The landlord's lien and power to distress are co-eval with

<sup>1</sup> Holladay et al. v. Bartholomæ et al., 11 Ill. App. 206.

<sup>2</sup> Holladay et al. v. Bartholomæ et al., 11 Ill. App. 206.

<sup>3</sup> Lynch v. Baldwin, 69 Ill. 210.

<sup>4</sup> Johnson v. Prussing, 4 Ill. App. 575.

<sup>5</sup> Johnson v. Prussing, 4 Ill. App. 575.

<sup>6</sup> Kassing et al. v. Keohane, 4 Ill. App. 460.



the earliest history of the common law and have maintained their energy to the present time.<sup>1</sup>

By the act of 1857, the common law relative to proceedings for distress of rent is so modified as to authorize distress to be made for the period only of six months after the expiration of the lease; and where a distress warrant issues more than six months after rent has become due and the lease terminated and the demised premises abandoned, such warrant is without authority of law and null and void.<sup>2</sup>

A landlord has a lien and a right to distress in all cases where rent is certain, whether the right to distress is reserved or not in the lease.<sup>3</sup>

A person not a lessor or grantee, assignee or heir, or a personal representative of the lessor, cannot maintain a distress for rent.<sup>4</sup>

Where a tenant removes from or abandons the leased premises, the statute gives the landlord the right to distress for rent and also for that to become due. The tenant cannot, by giving notice that he intends to leave, deprive the landlord of his right to distress.<sup>5</sup>

**§ 201. Amount claimed by landlord limits his recovery.**—The amount claimed by the landlord in the distress warrant fixes the limit of his recovery. He is not authorized to seize property and sell it for a greater amount than that stated in the warrant, and to sustain

<sup>1</sup> O'Hara v. Jones, 46 Ill. 288.

<sup>2</sup> Werner v. Ropiequet, 44 Ill. 522.

<sup>3</sup> O'Hara v. Jones, 46 Ill. 288.

<sup>4</sup> McGillick v. McAllister, 10 Ill. App. 40.

<sup>5</sup> Hare v. Stegall. 60 Ill. 380.

the warrant, he must show on the trial that he was entitled to as much rent as is specified in the warrant, and no more. The tenant can reduce the amount by proving payment of part. The landlord is strictly confined to the claim he makes in the distress warrant.

§ 202. **The office of the warrant.**—The warrant is of the nature of a summons and declaration, and there is no rule better settled, than that it is error to render judgment for a larger sum than that claimed in the declaration, whatever may be the form of action.<sup>1</sup>

A replication to an avowry in an action of replevin, justifying the taking under a distress for rent in arrear, which avers various breaches of the contract of leasing, whereby the tenant sustained great damage, is fatally defective, if it fails to aver that such damages are equal to or exceed the rent due. The naming of several amounts of damages which, when added together, exceed the rent claimed, will not be sufficient, as the party is not bound to prove such sums as laid. The pleadings should contain a specific averment that the damages are equal to or greater than the rent in arrear.

Where a distress has been replevied, the tenant may show that there have been breaches of the covenants or agreements on the part of the landlord which have produced damages equal to or greater than the amount of the rent due, and thus defeat the levy of the distress warrant.<sup>2</sup>

The delivery of a distress warrant to an officer or person, with directions to execute it, does not render the

<sup>1</sup> *Asay v. Sparr*, 26 Ill. 115; *Brown et al. v. Smith et al.*, 24 Ill. 197.

<sup>2</sup> *Lindley v. Miller*, 67 Ill. 244.

landlord liable for the unauthorized and unapproved acts of the bailiff or his associates.<sup>1</sup>

§ 203. **Landlord's lien on crops.**—A landlord's lien on crops for rent is paramount to the lien of an execution. Such lien does not invest him with the title, either general or special, it and the right of possession remaining in the tenant, subject to be divested by an appropriate proceeding at law.<sup>2</sup>

A landlord has no lien for rent on property of his tenant other than crops.<sup>3</sup>

A condition in a lease providing that a lessor shall have a valid and first lien upon the property of the lessee for rent, refers only to property owned at the making of the lease.<sup>4</sup>

The *bona fide* purchaser of farm crops from a tenant takes them subject to the lien of the landlord under the statute for unpaid rent.<sup>5</sup>

The landlord's statutory lien upon crops grown upon the demised premises does not follow such crops in the hands of a *bona fide* purchaser without notice.<sup>6</sup>

A lien may be preserved by stipulation in a lease upon the lessee's interest in the demised premises and upon the buildings and improvements thereon, to secure the payment of the rent, and such lien will be good and enforceable between the parties and all persons except

<sup>1</sup> Dow v. Blake, 15 Ill. App. 89.

<sup>2</sup> O'Malia et al. v. Glynn, 42 Ill. App. 51.

<sup>3</sup> Felton et al. v. Strong, 37 Ill. App. 58.

<sup>4</sup> Borden v. Croak, 33 Ill. App. 389.

<sup>5</sup> Finney v. Harding, 32 Ill. App. 98.

<sup>6</sup> Howe v. Clark, 23 Ill. App. 145.

creditors and persons without notice, although the lease be not acknowledged or recorded.<sup>1</sup>

§ 204. **The trial in distress cases.**— In a distress for rent, it is error to render judgment on the finding and award a special execution. The court should ascertain if the relation of landlord and tenant existed; *secondly*, if so, find the amount of rent due; and, *thirdly*, have it certified to the bailiff making the levy, which certificate constitutes his warrant for selling the property and applying the proceeds to the payment of the rent found due.<sup>2</sup>

§ 205. **Cases in illustration.**— In a replevin by a landlord for 100 acres of corn, taken on two judgments against a tenant, claiming his lien as superior to that of the executions. (1879.) The court held, the lien given by statute (Rev. Stat. 1874, p. 661, § 31) on crops grown or growing on the demised premises, does not grow out of a levy of a distress warrant. It is a *paramount* lien of which every person must take notice, and which can be lost only by waiver or failing to enforce it at the proper time.<sup>3</sup>

Where a landlord took possession of crops (corn in a crib) for rent of the year, without levying a distress warrant on it or doing anything further to enforce his lien; held, he had a right to the same as against a purchaser from the tenant to the extent of the rent.<sup>4</sup>

On its being claimed that the landlord had only a mere

<sup>1</sup> Webster et al. v. Nichols et al., 104 Ill. 160.

<sup>2</sup> Kruse v. Kruse, 68 Ill. 188.

<sup>3</sup> Thompson v. Mead, 67 Ill. 395; Prettyman v. Unland et al., 77 Ill. 206; Wetsel v. Mayers et al., 91 Ill. 497.

<sup>4</sup> Hunter et al. v. Whitfield et al., 89 Ill. 229.

*lien* under the statute and did not have the right of possession unless he obtained it by the levy of a distress warrant, the court said: "There is nothing in the statute which indicates that the levy of a distress warrant is essential to a right of possession of the property on which the lien exists or that *that* is the exclusive remedy for the assertion or protection of the landlord's lien."<sup>1</sup>

Under sec. 8, ch. 60, R. S. 1845 (335), providing "Every landlord should have a lien upon the crops growing or grown \* \* \* in any year, for rent that shall accrue for such year," the court held that where a crop is sown in the fall of one year and is harvested the next summer, having grown partly in two years, the rent of each year becomes a lien on it, which the landlord may enforce by distress.<sup>2</sup>

A landlord having a lien on growing or grown crops, prior to that of an execution, is entitled to the possession of the crops and may maintain replevin against the officer seizing them without regard to any proceedings by distress.

In this case, property subject to the lien of the landlord (on crops) had been levied on and sold under an execution against the tenant. Thereafter, the landlord took the property by distress for the rent and sold it, and it was held that the levy and sale under the execution were subject to the landlord's lien upon the grain; that such sale under the execution in no wise affected the lien, and the purchaser only acquired the right to retain the overplus after satisfying the rent; and that the landlord could

<sup>1</sup> *Miller v. James*, 36 Ill. 399; 67 Ill. 395.

<sup>2</sup> *Wetsel v. Mayers et al.*, 91 Ill. 497.

still, notwithstanding the sale on the execution proceed by distress to enforce his lien against the grain.<sup>1</sup>

The statute gives a landlord a lien on crops growing or grown on demised land in any year for rent of that year.

This lien is not confined to any particular crop, but embraces *all* the crops or any portion of them no matter on what particular part of the premises raised. It is created by law and does not grow out of the levy of a distress warrant, and is paramount to the lien of an attachment, and can be lost only by waiver or failing to enforce it at the proper time.<sup>2</sup>

Where a farm was demised, of an house and land in two townships, separated by a public road, the house at a monthly cash rent and the farm land on shares, the contract being entire, and on an attachment levied on the tenant's crops after the rent for the *land* on which it grew was paid; held, the landlord had a lien on the crops for *house* rent and uncultivated premises prior to the attachment, and its precedence did not depend on the levy of a distress warrant or any other proceeding by him.

In an ordinary action for rent under a lease, damages sustained by the tenant by a breach of the lease by the landlord, may be recouped by the tenant. And the same rule applies in a proceeding by *distress* for rent.<sup>3</sup>

Where a distress has been *replevied*, the tenant may show breaches of the covenants or agreements of the landlord, which have produced damages *equal to or*

<sup>1</sup> Miles v. James et al., 36 Ill. 399.

<sup>2</sup> Thompson v. Mead et al., 67 Ill. 395.

<sup>3</sup> Lindley v. Miller, 67 Ill. 244.

*greater* than the rent due and thus defeat the lien of levy of the distress warrant.<sup>1</sup>

Where, when property was distrained for rent, and the amount due ascertained by a justice, the constable making the distress, sold the property without first having it *appraised*, as required by the statutes, and after tender of rent and costs, whereupon the tenant brought an action with two counts in case and one in trover; held, trover will lie in such a case; the statute requires the property to be *appraised* before it can be sold, and the requirement must be observed.<sup>2</sup>

The landlord's lien on crops growing or grown on the premises in any year for the year's rent, is not defeated by a sale of such crops or any portion thereof by the tenant to a person having *notice* of the fact of the tenancy, and that they were raised on the demised premises, but the landlord may enforce his lien upon such crops as against such purchaser.<sup>3</sup>

The landlord's lien attaches on the crops grown on the premises in any given year for the year's rent, from the time of the *commencement* of their growth, whether the rent is then due or not.

Where a purchaser of corn from a tenant knows the fact of the tenancy, and that his vendor, as such tenant, has raised the corn on the demised premises, this will be notice to him of any lien the landlord may have on the same for unpaid rent, and what is sufficient to put a pur-

<sup>1</sup> Lindley v. Miller, 67 Ill. 244.

<sup>2</sup> Hare v. Stegall, 60 Ill. 380; Lindley v. Miller, 67 Ill. 244; Streeter v. Streeter, 33 Ill. 155.

<sup>3</sup> 1 Chitty's Pleadings, p. 188, 6 Am. Ed.: Hare v. Stegall, 60 Ill. 380.

chaser on inquiry is good notice of whatever the inquiry would disclose.<sup>1</sup>

A landlord having the statutory lien cannot, in the absence of a levy of a distress warrant, maintain replevin.<sup>2</sup>

If the goods of a tenant are seized under execution or attachment, the landlord's lien for rent is superior and will hold the property. The statutory lien in favor of the landlord is superior to other junior liens and may be enforced against all but prior liens, and *bona fide* purchasers without notice have superior liens.<sup>3</sup>

Where rent was to be paid in wheat, to be delivered to the landlord when threshed in the granary, the landlord has no specific part of such grain that may be attached and sold, until the same is so set apart to him.<sup>4</sup>

The lien of the landlord for rent is usually created by statute and the extent of such lien and methods of enforcing it are regulated by statute.<sup>5</sup>

Where a farm is leased upon shares, if the relation of landlord and tenant existed, the property in the crop is in the tenant until harvested and divided; until such division, it cannot be levied upon as the property of the landlord. But in case the parties are tenants in common of the crop, the interest of the landlord may be levied upon before division.<sup>6</sup>

<sup>1</sup> Watt v. Scofield, 76 Ill. 261.

<sup>2</sup> O'Malia et al. v. Glynn, 42 Ill. App. 51.

<sup>3</sup> O'Hara v. Jones, 46 Ill. 288.

<sup>4</sup> Koob v. Ammann, 6 Ill. App. 160.

<sup>5</sup> Prettyman v. Unland et al., 77 Ill. 206; Webster et al. v. Nichols et al., 104 Ill. 160; Wetsel v. Mayers et al., 91 Ill. 497; Hunter et al. v. Whitfield, 89 Ill. 229; Thompson v. Mead et al., 67 Ill. 395.

<sup>6</sup> Hansen v. Dennison et al., 7 Ill. App. 73.



§ 206. **Practice in distress for rent.**—The action by distress is for rent due only, and unless the defendant opens the door to the investigation of other matters by pleading a set-off, the rent alone is the proper subject matter of the suit, and to this the proof should be confined. But if the tenant pleads a set-off, the landlord, by way of replication, may plead any matter of defense, such as a set-off, the same as if he were sued as defendant; but the landlord, in such case, cannot recover for any excess of his set-off over that of the tenant. The prayer for judgment in such replication should be as claimed in the declaration.<sup>1</sup>

In an action of trespass against the landlord, for taking the property of the tenant under a distress warrant, it is error to instruct the jury, that if the defendant took more than was necessary to pay the rent then due, or claimed more rent than was due, the distress was illegal as to the excess of property taken and for the rent not then due. The landlord is permitted to make a reasonable distress, and he is not bound to confine himself to the precise amount of rent due. If he were knowingly to claim more rent than was due for the purpose of oppression and wrong and levy an amount sufficient for its payment, he would be guilty of willfully and maliciously making an excessive levy; but a mere mistake in judgment as to the value of the property seized or a want of knowledge of the sum due, cannot render him a trespasser.<sup>2</sup>

Where any portion of the rent remains due and unpaid,

<sup>1</sup> Cox v. Jordan, 86 Ill. 560.

<sup>2</sup> Harms v. Solem et al., 79 Ill. 460.

the landlord has an undoubted right to distrain. If the distress is excessive or oppressive, the landlord may be liable in an action on the case for damages, but this will not render the distress illegal, so as to justify replevin of the property.<sup>1</sup>

A tenant upon a proceeding by distress may show, that he was evicted from a part of the premises, or that he was disturbed in his possession.<sup>2</sup>

<sup>1</sup> Lindley v. Miller, 67 Ill. 244.

<sup>2</sup> Wade v. Halligan, 16 Ill. 507.

## CHAPTER XX.

### EVICTIION.

SECTION 207. Definition.

208. Actual eviction.

209. Constructive eviction.

210. Cases in illustration.

211. Effect and consequences of eviction.

212. Taking from tenant part of premises.

213. To discharge the tenant from rent. he must abandon the premises.

214. Particular cases stated.

215. Threats by landlord against tenant.

216. Suspension of rent.

217. Damages for eviction.

§ 207. **Definition.**—Eviction is the taking from the lessee of the whole or a substantially valuable part of the leased premises.

The essence of eviction, according to its strict meaning, consists in the dispossession, and not in the withholding of possession; in the taking away from the tenant the whole or some part of the demised premises of which he was in possession.<sup>1</sup>

§ 208. **Actual eviction.**—Acts amounting to an eviction of the tenant must be something of a grave and permanent character done by the landlord, clearly indicating an intention on his part that the tenant should no longer continue to hold the premises.<sup>2</sup>

<sup>1</sup>Peck v. Hiller, 31 Barb. R. 117; Etheridge v. Osborne, 12 Wend. N. Y. 529.

<sup>2</sup>Hayner et al. v. Smith et ux., 63 Ill. 430.

A forcible expulsion is not necessary to constitute an eviction: but any act on the part of the landlord, done in violation of the rights of the tenant and without his consent, and which deprives him of the beneficial enjoyment of the premises, amounts to an eviction.<sup>1</sup>

The lessee may be evicted, not only by the taking from him of a portion of the land itself, but by interference with a privilege appertaining to the premises, such as an incorporeal hereditament; this will also constitute an eviction.<sup>2</sup>

An eviction consists of taking from a tenant some part of the demised premises of which he has possession. An act of permanent character done by the landlord in order to deprive, and which had the effect of depriving the tenant of the use of the thing demised, or of part of it, will amount to an eviction. An actual eviction suspends the rent, but does not terminate the lease. A constructive eviction may be by some acts done with the intention, and which have the effect of essentially interfering with the tenant's beneficial enjoyment of the premises involved, or some part thereof; but in order that such acts shall operate as an eviction, they must be of such character as warrant and are followed by the tenant giving up the possession; and rent will not be suspended, unless the tenant removes from the premises in question.<sup>3</sup>

Eviction by the lessor may be either actual or constructive.

A lessor would commit actual eviction should he cause

<sup>1</sup> Price v. Pittsburgh & F. W. & C. R. R. Co., 34 Ill. 13.

<sup>2</sup> Peck v. Hiller, 24 Barb. R. 178.

<sup>3</sup> Patterson et al. v. Graham, 40 Ill. App. 399.

the lessee to be expelled from the premises, as being the keeper of a disorderly house, and should then put a new tenant in the premises.<sup>1</sup>

§ 209. **Constructive eviction.**—A constructive eviction is committed when the landlord so interferes, or others over whom he possesses control, so interfere with the tenant's enjoyment of the premises that, although the tenant is neither physically expelled nor excluded, yet the law considers him justified in leaving, and he actually does leave.

Thus, the lessee of a second story of a building pursued the profession of dentistry, having reserved that privilege in his lease. The landlord's family appear to have determined to do what they could indirectly to render the practice of his profession on the premises impracticable. They accordingly muffled the door bell, so that his patients were sometimes obliged to employ fifteen or twenty minutes or more in ringing and waiting before effecting an entrance, and, in some instances, left without succeeding in obtaining admittance, and also littered the stair carpet with nut-shells, dirt, and other filth, perpetrated other annoyances of like nature and addressed impertinent language to persons visiting the tenant on business. The tenant and his family were subjected to abusive language and other annoyances, "petty," said the court, "in their detail and taken singly, but, in the aggregate, sufficient to render them very uncomfortable and unhappy."

<sup>1</sup> The casual occupation by the landlord of a small portion of the premises, will not, in every instance, be an

<sup>1</sup> Hope v. Eddington, Lator R. 43.

eviction. Thus, it would not be an eviction for the landlord to pile firewood on a portion of the leased land, provided he would not, by doing so, interfere with the substantial enjoyment of the premises.

These and similar facts have been considered insufficient to constitute an eviction justifying the tenant in abandoning the premises.

So if the landlord use for immoral purposes, a portion of the house not let to the tenant, and the latter be seriously disturbed by the loudly-riotous and obscene behavior of the landlord and his friends, he may, it has been held by the highest court of the state of New York, abandon the premises and claim the benefit of a constructive eviction. This latter form of constructive eviction is sometimes called moral eviction.<sup>1</sup>

If a railroad company enters into possession of a part of the demised premises by permission of the landlord, it would amount to an eviction of that part.<sup>2</sup>

The taking possession of hotel furniture by the landlord under a chattel mortgage, given by a tenant to secure the payment of rent due and to become due, upon default of its condition, is not an eviction of the tenant by the landlord so as to terminate the tenancy and stop the rent.<sup>3</sup>

So, if the tenant yields possession of the demised premises, in consequence of a judgment for the recovery of possession, to the person adjudged to be the rightful owner of the paramount title, it is an eviction. A judgment alone, however, is not sufficient. The possession must be disturbed or yielded. This distinction will

<sup>1</sup> Hope v. Eddington. Lalor R. 43.

<sup>2</sup> Halligan v. Wade, 21 Ill. 470.

<sup>3</sup> Morris v. Tillson et al., 81 Ill. 607.

reconcile the authorities, which otherwise may seem conflicting. The rule gathered from all the authorities seems to be, that a person cannot remain in possession of the premises and still claim that he has been turned out; nor, when the judgment of a competent court has determined that he shall deliver possession to a particular person, is he required to wait until he is forcibly ejected.<sup>1</sup>

§ 210. **Cases in illustration.**—Wrongful acts of the landlord do not amount to an eviction in law, when there is neither actual nor constructive expulsion of the tenant.<sup>2</sup>

Acts of the landlord in interference with the tenant's possession, to constitute an eviction, must clearly indicate an intention on the part of the landlord that the tenant shall no longer continue to hold the possession.<sup>3</sup>

There is no constructive eviction without a surrender of the possession. A tenant cannot remain in possession and, when sued for the rent, sustain a plea of eviction by proof that there were circumstances which would have justified him in leaving the premises. The acts of interference, if acted upon by the tenant by his leaving the premises, may amount to an eviction; yet, if he still continues to remain in possession, he would be liable for the rent.<sup>4</sup>

A tenant will not be held to have been evicted where,

<sup>1</sup> Home Life Ins. Co. v. Sherman, 46 N. Y. 370.

<sup>2</sup> Bennett v. Bittle, 4 Rawle, Pa. 399; Campbell v. Shields, 11 How Pr. N. Y. 165.

<sup>3</sup> Morris v. Tillson et al., 81 Ill. 607; Hayner et al. v. Smith et ux., 63 Ill. 430.

<sup>4</sup> Boston R. R. Co. v. Ripley, 13 Allen, Mass. 241; Jackson v. Eddy, 12 Mo. 209; Elliott v. Aikin, 45 N. H. 30.

notwithstanding there may have been disturbances, he has continued to remain in possession of the entire premises during the full term of his lease. An eviction cannot take place without an actual expulsion or an abandonment of the whole or a part of the premises.<sup>1</sup>

Whether the acts of the landlord amount to an eviction or not, is a question of fact for the jury, in consideration of all the facts and circumstances. The temporary interference with the enjoyment of the premises occasioned by acts of the landlord in putting in a water-pipe, pump and sink in an upper room of the demised premises, without the tenant's consent, does not amount to an eviction.<sup>2</sup>

The renting of a reserved part of the same premises to another for purposes that destroy their usefulness to the tenant upon whom a distress is levied, will amount to an eviction, whether the purposes for which they are rented are lawful or unlawful.<sup>3</sup>

Where, under an agreement, the demise was of the farming lands described and mentioned in the lease, together with the right to mine, dig, extract and carry away coal from the premises, and with the enjoyment and occupation of so much of the surface of said lands as might be necessary to carry on the mining-of-coal business, held, that the farming land was as definite and certain as the right to mine for coal, and that if the grantor in said agreement prevented the grantee from using the farming land, it would amount to an eviction. A plea setting up that the grantor had

<sup>1</sup> DeWitt v. Pierson, 122 Mass. 8; Gilhooley v. Washington, 4 N. Y. 217.

<sup>2</sup> Lynch v. Baldwin, 69 Ill. 210.

<sup>3</sup> Halligan v. Wade, 21 Ill. 470.



prevented the grantee from using such farming lands was a good plea, and it was error to sustain a demurrer to it.<sup>1</sup>

Where a tenant in possession is ordered by the sheriff having a writ of restitution based upon a judgment against the landlord, to vacate the premises described in the writ, and he and his family leave the premises and commence to take their goods away, and then the party entitled to possession under the writ executes a lease to such tenant and permits him to retain possession under him, there is such an eviction by judgment of court as excuses the tenant from the payment of rent to the first landlord.<sup>2</sup>

§ 211. **Effect and consequences of eviction.**—An eviction in fact or in effect, which renders the premises useless, may prevent a recovery of rent.<sup>3</sup>

Eviction of a tenant by the landlord or a stranger before the end of the term, exonerates the tenant from the payment of rent.<sup>4</sup>

When the landlord forbids an under tenant to pay rent and collects the same himself, this will amount to an eviction of his tenant and exonerate him from the payment of rent after such act.

An eviction of the tenant by the landlord or a stranger at any time during the term, will discharge the tenant from the further payment of rent, and any act of the landlord which renders the lease unavailing will exonerate

<sup>1</sup> Walker et al. v. Tucker et al., 70 Ill. 527

<sup>2</sup> Montanye v. Wallahan, 84 Ill. 355.

<sup>3</sup> Halligan v. Wade, 21 Ill. 470.

<sup>4</sup> Wright v. Lattin et al., 38 Ill. 293.

the tenant from its terms and conditions, and he may abandon it.<sup>1</sup>

Where a lessee is, by his lessor, wrongfully evicted from a portion of the demised premises, he is thereby excused from the payment of any of the rent, although he remains in possession of the remaining portion of the premises to the end of the term.<sup>2</sup>

§ 212. **Taking from tenant part of premises.**—If a tenant loses the benefit of any portion of the demised premises by the act of the landlord, rent is thereby suspended. The act of the landlord must be something more than a mere trespass to have this effect; it must be something of a permanent character, done with the intention of depriving the tenant of the enjoyment of the premises.<sup>3</sup>

It is no defense to an action for rent that the lessee never took possession, unless he was deprived of possession by the lessor; but rent ceases in case the tenant is deprived of possession by the landlord or another holding paramount title.<sup>4</sup>

Eviction is not a bar to rent that had previously accrued.<sup>5</sup>

§ 213. **To discharge the tenant from rent, he must abandon the premises.**—“Where a tenant is evicted from the demised premises, before his term has expired, by his landlord or any one claiming under or through him, or by one under title paramount to that of the

<sup>1</sup> *Leadbeater v. Roth*, 25 Ill. 587; *Halligan v. Wade*, 21 Ill. 470.

<sup>2</sup> *Hayner et al. v. Smith et ux.*, 63 Ill. 430.

<sup>3</sup> *Lynch v. Baldwin*, 69 Ill. 210.

<sup>4</sup> *Field et al. v. Herrick et al.*, 10 Ill. App. 591.

<sup>5</sup> *Grommes et al. v. St. Paul Trust Co. et al.*, 47 Ill. App. 568.

landlord, no recovery can be had for rent accruing after eviction. In case a tenant should be evicted, then, and not until then, will he be in a position to invoke the aid of the court in his behalf. In the case under consideration the court said, 'No eviction has occurred; it will be time enough to complain when they have been evicted.''' The fact that the landlord has suffered a decree to be taken for the sale of the demised premises in a proceeding to enforce a mechanic's lien, in violation of his contract to defend the suit, upon which the premises may be sold and the tenant evicted, presents no ground for resisting the collection of rents by the landlord.<sup>1</sup>

Although a tenant evicted from a part of the demised premises is not under obligation to pay rent for the part he occupies, as the landlord will not be permitted to apportion the rent by his own wrong, yet if the tenant, at the expiration of the term, gives his note for the rent of the premises, it may be collected.<sup>2</sup>

An eviction of the whole premises by another than the landlord, under paramount title, discharges the rent. An eviction of only a part of the premises by a stranger will authorize an apportionment of the rent, but if the eviction is by the landlord and the tenant is kept out of possession of that part, the whole rent will be discharged.<sup>3</sup>

A tenant cannot retain the possession of the leased premises and refuse the payment of rent on the ground of a mere constructive eviction. The question of evic-

<sup>1</sup> Leopold et al. v. Judson et al., 75 Ill. 536.

<sup>2</sup> Anderson et al. v. The Chicago M. & F. I. Co., 21 Ill. 601.

<sup>3</sup> Halligan v. Wade, 21 Ill. 470; 3 Kent, 464; 1 Sanders, Rep. 204, note 2.

tion or no eviction depends upon the circumstances and is in all cases to be decided by the jury.<sup>1</sup>

Even if the landlord has no title, the tenant cannot complain till evicted.<sup>2</sup>

The eviction of a lessee from the demised premises under a paramount title will discharge him from the payment of any part of the rent which may fall due by the terms of the lease after such an eviction.<sup>3</sup>

**§ 214. Particular cases stated.**—Where a judgment in forcible entry and detainer is relied on as evidence that the tenant had been evicted and the lease terminated, mere verbal testimony that the landlord had recovered such a judgment, without showing service on or appearance by the tenant to the suit, is not sufficient to prove a binding judgment that will establish the termination of a lease.<sup>4</sup>

Where a tenant yields possession to a purchaser, at a foreclosure sale, of the landlord's interest, it will constitute an eviction for all purposes.<sup>5</sup>

If the grantee of a lessor lets to another during the unexpired term, who evicts the first tenant, such grantee becomes responsible for the act.<sup>6</sup>

The failure of a landlord to furnish material for repairs, as agreed in the lease, does not amount to an eviction of the tenant.<sup>7</sup>

<sup>1</sup> *Patterson et al. v. Graham*, 140 Ill. 531; *Hayner et al. v. Smith et ux.*, 63 Ill. 430; *Lynch v. Baldwin*, 69 Ill. 210.

<sup>2</sup> *Ankeny v. Pierce*, 1 Ill. 262.

<sup>3</sup> *Stubbings v. The Village of Evanston*, 136 Ill. 37.

<sup>4</sup> *Cheney v. Bonnell*, 58 Ill. 268.

<sup>5</sup> *Conley v. Schiller*, 34 N. Y. Sup. 473.

<sup>6</sup> *Wright v. Lattin et al.*, 38 Ill. 293.

<sup>7</sup> *McFarlane v. Pierson*, 21 Ill. App. 566.

Whether the premises can be abandoned, and payment of rent successfully resisted, when it is not the conduct of the landlord and his guests, but that of other tenants, which is thus objectionable, the landlord, although aware of their conduct, taking no measures to prevent its continuance, seems to be left in doubt; but some of the lower courts have held that, under such circumstances, the landlord having leased without the intent of causing a violation of law, and having no connection with the improper acts, payment of rent cannot be excused.<sup>1</sup>

§ 215. **Threats by landlord against tenant.**—Threats by a landlord, and conduct indicating desire that the tenancy terminate, may, in an aggravated case, justify abandonment of the premises by the tenant.

Thus, under an agreement by the owner to execute a lease, certain persons had entered into possession of the premises, and the owner, having subsequently prepared a lease not in accordance with the previous agreement, upon their declining to execute it in the form in which it had been drawn up, told them that "they must sign this lease or none; that they were not his tenants, and if they did not sign it he would make it hot for them; that he had them in his power, and if they did not sign it he would turn them into the street." They remaining unmoved by his threats, he posted a notice that the premises were to let, offered them to various persons, stating that the occupants were no tenants of his, and that he would show them that they would have to go. It was held that the tenants, under these circumstances,

<sup>1</sup> *Gilhooly v. Washington*, 3 Sandf. R. 330; *Townsend v. Gilsey*, 7 Ab. Pr. (N. S.) 59.

might abandon the premises, and that they were not liable to pay rent for the period during which, in spite of the lessor's conduct, they had occupied.<sup>1</sup> But if a landlord, under a mistaken impression that the term of the lease would expire at a date earlier than it was actually to end, should enter into negotiations to lease to other persons, and should post a bill on the premises announcing that they were to let, but, on discovering his mistake, should cease all interference, the tenant would not be justified in abandoning his lease.<sup>2</sup>

As there can be no eviction unless the tenant be expelled from or abandon the premises, should he remain in possession for any considerable period after being subjected to conduct by his landlord claimed by the tenant to have amounted to constructive eviction, he could not resist successfully payment of rent on account of it.<sup>3</sup>

§ 216. **Suspension of rent.**—The rule that eviction suspends the payment of rent, results from the meaning of the term “rent” and from the obligations of the relations between landlord and tenant. Rent is compensation for the use of land, and what the tenant pays rent for is quiet possession or beneficial enjoyment. When, therefore, the use or possession ceases by the act of the landlord, the consideration for the payment of the rent ceases.<sup>4</sup>

<sup>1</sup> Greton v. Smith, 33 N. Y. R. 245.

<sup>2</sup> Ogilvie v. Hull, 5 Hill, R. 52.

<sup>3</sup> Edgerton v. Page, 20 N. Y. R. 281; Edwards v. Candy, 14 Hun (N. Y. S. C.), R. 596; Leopold v. Judson, 75 Ill. 536; Patterson v. Graham, 140 Ill. 531; Hayner v. Smith et ux., 63 Ill. 435; Lynch v. Baldwin, 69 Ill. 210.

<sup>4</sup> Grommes et al. v. St. Paul Trust Co. et al., 147 Ill. 634.

Acts by the landlord in interference with the tenant's possession, to constitute an eviction, must clearly indicate an intention on the part of the landlord that the tenant shall no longer continue to hold the premises. Such acts relieve the tenant from the payment of rent accruing after his possession ceases, but rent already accrued and overdue is not forfeited by the eviction.<sup>1</sup>

§ 217. **Damages for eviction.**—Eviction by the landlord from any portion of the premises works a suspension of the whole of the thereafter accruing rent. The landlord will not be permitted to apportion his own wrong.

On being thus evicted from the whole premises, the tenant may recover the difference between the value of the lease for the unexpired term, and the stipulated rent, together with any other damages necessarily resulting from the eviction, the amount of difference between the expense of removal at the time of the eviction, and what such expense would be at the end of the term, if at the latter period it would be less, being recoverable, among other items of damage.

On eviction by title paramount from a portion of the premises, the rent is apportioned, ceasing as to the portion from which the tenant has suffered eviction.

Nominal damages only can be recovered from the landlord on eviction by title paramount, the obligation to pay rent being suspended; but rent which, during the last six years immediately preceding the eviction, has been paid, may, it seems, be recovered back with interest,

<sup>1</sup>Grommes et al. v. St. Paul Trust Co. et al., 147 Ill. 634.

the tenant being answerable to the true owner for the amount as mesne profits.

If a tenant is evicted from land after his crops are planted, their value at the time of eviction is the measure of his damages.<sup>1</sup>

<sup>1</sup> Olmstead v. Burke, 25 Ill. 86.



## CHAPTER XXI.

## APPEALS AND APPEAL BONDS.

SECTION 218. Statutory provisions as to bonds.

219. Appeal bond indispensable.

220. Bond—By whom approved.

221. What gives the upper court jurisdiction.

222. The penalty of the bond.

223. Conditions of the appeal bond.

224. What the bond should be.

225. Bonds in larger amount may be required.

226. Sureties on appeal bonds.

227. Bonds must be in writing.

228. What will discharge the surety.

229. Co-sureties.

230. The defense of the sureties.

§ 218. Statutory provisions as to bonds.

*Defendant's Appeal Bond—New Bonds.*

SEC. 19. If the defendant appeals, the condition of the bond shall be, that he will prosecute such appeal with effect and pay all rent then due or that may become due before the final determination of the suit, and also all damages and loss which the plaintiff may sustain by reason of the withholding of the premises in controversy, and by reason of any injury done thereto during such withholding until the restitution of the possession thereof to the plaintiff, together with all costs that may accrue in case the judgment from which the appeal is taken is affirmed or appeal dismissed; which said bond shall be in sufficient amount to secure such rent, damages and costs,

to be ascertained and fixed by the court. And the court in which the appeal may be pending, may require a new bond in a larger amount, if necessary, to secure the rights of the parties: and in case of continuance, may require another bond to be given to further secure the same.

*Plaintiff's Appeal Bond.*

SEC. 20. If the plaintiff appeals, the condition of the bond shall be as in other cases of appeal, when taken by the plaintiff, except as otherwise provided by law.

*Appeal—Writ of Restitution—Bond.*

SEC. 18. If any party shall feel aggrieved by the verdict of the jury or decision of the court, upon any trial had under this act, such party may have an appeal, to be taken to the same courts, in the same manner and tried in the same way as appeals are taken and tried in other cases. Provided, the appeal is prayed and bond is filed within five (5) days from the rendition of the judgment, and no writ of restitution shall be issued in any case until the expiration of said five (5) days.

§ 219. **Appeal bond indispensable.**—The only way in which the defendant can appeal from the judgment rendered in forcible entry and detainer is by praying the same and filing his bond in an amount fixed by the trial court within five days of the rendition of such judgment. There can be no appeal pending and no court in which the appeal is pending until the bond is executed and filed, and no legal bond can be made until the amount is fixed by the court. Necessarily, the trial court alone

can determine the amount. The new bond that may be required pending the appeal, can only be made by the court upon the showing that such new bond is necessary to secure the rights of the parties.<sup>1</sup>

Failure to appeal and file a bond within five days from the rendition of the judgment is fatal in an action of forcible entry and detainer; the time for filing such bond cannot be extended.<sup>2</sup>

A party appealing, in order to have an appeal, must file his bond within five days from the rendition of the judgment.<sup>3</sup>

The clerk of the court to which an appeal is taken in a suit of forcible entry and detainer has no authority to ascertain and fix the appeal bond; this must be done by the trial court.<sup>4</sup>

Where a justice of the peace issues a summons in an action of forcible entry and detainer, without an affidavit having been previously filed, an appeal to the Circuit Court by the defendant will not waive or cure the want of jurisdiction of the justice over the subject matter. Such a case is not within the rule, that an appeal by the defendant will cure the want of summons before the justice.<sup>5</sup>

Where a defendant, in an action of forcible entry and detainer, appears and goes to trial in the Circuit Court without objection to the regularity of the proceedings,

<sup>1</sup> Fairbank v. Streeter, 142 Ill. 226.

<sup>2</sup> Kenny v. Jones et al., 37 Ill. App. 615.

<sup>3</sup> Fairbank v. Streeter, 41 Ill. App. 434.

<sup>4</sup> Bowlby v. Robinson et al., 45 Ill. App. 531.

<sup>5</sup> Stolberg v. Ohnmacht, 50 Ill. 442.

he thereby admits their regularity and the validity of the demand of possession.<sup>1</sup>

§ 220. **Bond by whom approved.**—Where the defendant in an action of forcible entry and detainer appeals from the judgment of the justice of the peace to the Circuit Court within such time that the case will not stand for trial at the first term of the court, the court may require the party taking the appeal to file a bond in addition to the appeal bond, to secure the rents which may accrue between that term and the term to which the case is necessarily continued, and on neglect of the party to comply with the rule in that regard, the court may dismiss the appeal.<sup>2</sup>

§ 221. **What gives the upper court jurisdiction.**—Where a defendant appeals from a judgment against him in a justice court, by filing his appeal with the clerk of the Circuit Court, but files no transcript from the court below, the Circuit Court will have no jurisdiction of the subject matter and cannot dismiss the appeal on the appearance of the appellee for want of prosecution in the absence of appellant and render judgment for damages against the latter for costs.<sup>3</sup>

Where an appeal from a justice of the peace is perfected before a clerk of the Circuit Court and no summons and alias summons are issued and returned not found, and the appellee has not entered his appearance in writing ten days before the commencement of the term, or appeared at a prior term, it is error to dismiss

<sup>1</sup> Dunne v. Trustees of Schools, 39 Ill. 578.

<sup>2</sup> Rider v. Bagley, 47 Ill. 365.

<sup>3</sup> Sheridan v. Beardsley et al., 89 Ill. 477.

the appeal for want of prosecution, when reached on the docket, on motion of the appellee.<sup>1</sup>

Where a complaint in an action of forcible entry and detainer has no jurat attached to it, and the defendant went to trial before the justice of the peace without making any objection to the complaint, and took an appeal to the Circuit Court, and there for the first time entered a motion to dismiss the suit on account of the defect in the complaint and, upon that motion being overruled, went to trial without excepting to the ruling of the court, and the transcript of the justice showed that the complaint was sworn to, it was held that, although the filing of a complaint was jurisdictional, the defendant had waived the defect that existed in the complaint.<sup>2</sup>

The sixth section of the "Act to amend chapter 43, of the revised statutes of 1845, entitled 'forcible entry and detainer,'" in force February 16, 1865, does not repeal that part of the amended statute which requires the appeal bond in cases of forcible entry and detainer to contain a clause for the payment of all rents becoming due, etc., but simply requires the bond to contain additional guaranties for the benefit of the plaintiff.<sup>3</sup>

When the appeal bond given by the defendant in an action of forcible entry and detainer contains no clause for the payment of rent, as required by the statute, or any words from which the payment of rent can be

<sup>1</sup> Sheridan v. Beardsley et al., 89 Ill. 477.

<sup>2</sup> Center v. Gibney, 71 Ill. 557.

<sup>3</sup> Pitt et al. v. Swearingen, 76 Ill. 250.

implied, no recovery of rent can be had in a suit upon the same.<sup>1</sup>

§ 222. **The penalty of the bond.**—An appeal bond given upon an appeal to the Circuit Court taken by the defendant in an action for forcible detainer, should be in a penalty sufficient to secure the payment, not only of the costs of the suit, but also the rents becoming due from the commencement of the suit until the final determination thereof.<sup>2</sup>

Where an appeal from a justice of the peace is perfected by filing the appeal bond in the office of the justice, no summons is required to be issued to the appellee; in such case the appellee may, without having entered his appearance in the Circuit Court, and upon his motion, have the appeal dismissed for want of prosecution.<sup>3</sup>

But if an appeal be perfected by filing the appeal bond in the office of the clerk of the Circuit Court, a summons must issue to the appellee; in that case, the appellant, *using proper diligence in procuring process*, the appellee, if not served with the process, would have no right, by entering his appearance, to have the appeal dismissed for want of prosecution.<sup>4</sup>

Where in appeals, in forcible entry and detainer cases, a bond is given, and subsequently a new bond is given in a larger amount, as provided by the statute, the latter operates as a satisfaction and extinguishment of the former bond.<sup>5</sup>

<sup>1</sup> Pitt et al. v. Swearingen, 76 Ill. 350.

<sup>2</sup> Billings v. Lafferty, 31 Ill. 318.

<sup>3</sup> Boyd v. Kocher, 31 Ill. 295.

<sup>4</sup> Boyd v. Kocher, 31 Ill. 295.

<sup>5</sup> Poppers v. The International Bank, 10 Ill. App. 531.

If a party on appeal in forcible entry and detainer omit to use proper diligence in procuring the process, the appellee may, without having been served with summons, by entering his appearance in the Circuit Court hold the same position he would if duly served.<sup>1</sup>

A motion to amend a bond on an appeal from a justice of the peace in a case of forcible entry and detainer is addressed to the sound discretion of the court, and its decision can not be assigned for error.<sup>2</sup>

Under the statute as heretofore given on page 260, appeals may be perfected by filing bond and praying an appeal either in the justice court where the action was tried, or by application to the clerk of the Circuit Court (or of the Superior Court of Cook County), and the justice of the peace, or the clerk of the higher court, is bound by law to take a proper bond to secure the appellee in rents, costs and damages, pending the appeal; and in case the bond is insufficient, the appellee can have the difficulty remedied by moving the court to require a new and sufficient bond. Yet it is the duty of the justice and the clerk of the court to require a sufficient bond, and if loss occurs to the appellee by reason of an insufficient appeal bond, an action of trespass on the case will lie against the clerk who wrongfully approves an appeal bond which provides a penalty less than is required by law.<sup>3</sup>

**§ 223. Conditions of appeal bonds.**—“The conditions of an appeal bond are controlled by the character of the

<sup>1</sup> *Boyd v. Kocher*, 31 Ill. 295.

<sup>2</sup> *Harlan v. Scott*, 2 Scammon (Ill.), 65.

<sup>3</sup> *Billings v. Lafferty*, 31 Ill. 318.

judgment from which the appeal is taken. Where the appeal operates as a supersedeas, the bond should secure the debt, damages, and costs. An irregular appeal bond is good as far as it goes, if the cause proceeds upon the faith of such bond. The word 'damages' in an appeal bond means the damages in consequence of the appeal; that is, the interest at the rate fixed by statute upon the amount of the judgment below, from the date of its rendition to the time of entering the judgment above; and the damages are recoverable against the surety whenever the appeal is not prosecuted with effect; that is to say, where the final recovery is for the same or a larger amount than the judgment below."<sup>1</sup>

**§ 224. What the bond should be.**—The appeal bond in forcible entry and detainer cases is the same as that required in other appeals, with the addition of a clause for the payment of rents pending the appeal.<sup>2</sup>

While a strict compliance with the statute as to the time within which the bond must be filed and as to the approval thereof is required, the rule has never been applied to defects in the bond, such as a lack of seal and failure to make it in sufficiently large penalty, or to incorporate in it the conditions which the statute directs that it shall contain.<sup>3</sup>

If an appeal bond contains conditions not required by the statute, such conditions are surplusage and not binding.<sup>4</sup>

<sup>1</sup> Amer. & Eng. Encyc. of Law, p. 466.

<sup>2</sup> Tolman et al. v. Green et al., 39 Ill. 225.

<sup>3</sup> Fairbank v. Streeter, 41 Ill. App. 434.

<sup>4</sup> Tolman et al. v. Green et al., 39 Ill. 225.



Upon an appeal from a justice of the peace in an action of forcible entry and detainer, the appellate court, upon dismissing the appeal, has no jurisdiction to enter judgment for costs against the security in the appeal bond: such a judgment would be void.<sup>1</sup>

In an action on an appeal bond in forcible entry and detainer, damages resulting from the forcible entry and detention of the premises, apart from the rental thereof, are not recoverable.<sup>2</sup>

Where an appeal bond, in a case of forcible entry and detainer, was conditioned for the payment of all damages that had or should accrue by the reason of forcible entry and detainer, it was held, that this condition was not required by the statute and was void.<sup>3</sup>

An appeal bond should cover accruing rents.<sup>4</sup>

Where an appeal bond in forcible entry and detainer is conditioned to pay all rents that may have accrued, and fails to provide for the rents to become due, it is wholly insufficient.<sup>5</sup>

As the defendant in an action of forcible detainer can give no appeal bond until the amount thereof is fixed by the trial court, he cannot take an appeal from a judgment against him until the amount of his bond is fixed by such court.<sup>6</sup>

**§ 225. Bond in larger amount may be required.—**  
The judge of the Circuit Court, on an appeal from the

<sup>1</sup> Keary v. Baker, 33 Mo. 603.

<sup>2</sup> Tolman et al. v. Green et al., 39 Ill. 225.

<sup>3</sup> Tolman et al. v. Green et al., 39 Ill. 225.

<sup>4</sup> Rucker v. Wheeler et al., 39 Ill. 436.

<sup>5</sup> Wood v. Tucker, 66 Ill. 276.

<sup>6</sup> Fairbank v. Streeter, 142 Ill. 226.

judgment of a justice of the peace in an action of forcible detainer, is not concluded by the penalty of the appeal bond as fixed by the justice of the peace or clerk, but may require bond to be filed in a larger sum, and in case, of failure to do so, dismiss the appeal.<sup>1</sup>

An appeal bond in such case, conditioned for the payment of all damages for the wrongful detention of the premises, and a second bond filed by leave of the court, conditioned for the payment of all rents, costs and damages for the wrongful detention of the premises, were both wholly insufficient, both in form and substance.<sup>2</sup>

Where the plaintiff in an action of forcible entry and detainer is wrongfully kept out of the possession of the premises during the pendency of an appeal, the value of the use and occupation or the reasonable rental value is the correct measure of damages in an action on the appeal bond.<sup>3</sup>

A surety on a lease becomes responsible for the payment of the rent reserved in the lease, in the event of a default by the tenant. The landlord, before resorting to his remedy against the surety, is not obliged to demand the rent from the tenant or institute proceedings to recover the same or notify the surety of the non-payment by the tenant.<sup>4</sup>

§ 226. **Sureties on appeal bonds.**—The performance by the tenant of the covenants and agreements of the

<sup>1</sup> Wood v. Tucker, 66 Ill. 276.

<sup>2</sup> Wood v. Tucker, 66 Ill. 276.

<sup>3</sup> Shunick et al. v. Thompson, 25 Ill. App. 619.

<sup>4</sup> Ducker v. Rapp, 41 N. Y. Sup. Ct. 235; Voltz v. Harris et al., 40 Ill. 155; Taylor v. Taylor, 64 Ind. 356.

lease may be secured or guaranteed by a collateral undertaking of a surety. This undertaking need not be in a separate instrument. A person who has subscribed a lease, together with the lessee, may be shown to be a surety instead of a joint lessee; but, probably, not so as to impair the remedy of a lessor who is without notice of such person being a guarantor only, nor, perhaps, where the lease itself expresses that he signs as a principal.<sup>1</sup>

§ 227. **Bonds must be in writing.**—The statute of Illinois provides (ch. 59, sec. 1) as follows, viz. :

That no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

An appeal bond must be executed by the person named as security in the order granting the appeal; if not so executed, the appeal will be dismissed; for instance, the order provided that the appeal should be granted upon appeal bond being filed with “Henry Service” as surety and the bond was filed with J. H. Servoss as surety; this was insufficient and the appeal dismissed.<sup>2</sup>

*Must Be Made by Appellant.*

Again, the Supreme Court held an appeal bond

<sup>1</sup> Rosenbaum v. Gunter, 2 E. D. Smith R. 415.

<sup>2</sup> Shinkell v. Letcher et al., 40 Ill. 48.

insufficient which was signed by the landlord of the plaintiff as principal, holding that the bond must be made by the plaintiff himself.<sup>1</sup>

*Filing New Bond Discharges the Old One.*

If the appeal bond is insufficient and a new one is filed and approved, the approval and acceptance of the new bond releases and discharges the sureties on the old bond and no recovery can be had on the first bond.<sup>2</sup>

If by agreement of the lessor the obligations of the lessee under the lease are so modified, as to result in impairing or delaying, or to render less efficient the lessor's recourse against the lessee, the surety will be thus discharged. Such, as to surety for payment of rent, would be the effect of an agreement, in binding form, by the lessor with the lessee, to extend the time of payment of rent; but a release or extension of time of payment of rent due would not change the surety's responsibility for payment of rent thereafter to accrue.<sup>3</sup>

**§ 228. What will discharge the surety.**—The surety will be discharged by any act of the lessor, which *enlarges*, but he will not be released in consequence of an agreement of the lessor which plainly *decreases*, his liability, such as an agreement reducing the rent; nor, it seems, in consequence of an agreement which indirectly renders loss less probable, as one that rent shall be payable monthly instead of quarterly, the latter being the manner in which it has been reserved in the lease.

<sup>1</sup> *Armson v. Forsythe*, 40 Ill. 49.

<sup>2</sup> *International Bank v. Pappers*, 105 Ill. 491.

<sup>3</sup> *Coe v. Cassidy*, 72 N. Y. R. 133.

A surety is not generally entitled to notice of the default of his principal.

The lessor, in suing, may join in a single action the lessee and his surety where the surety's undertaking has been embodied in the lease itself,—as if he has subscribed that instrument “A. B., surety for” the lessee; but where the guaranty is contained in a separate instrument a distinct action against the surety seems to be requisite.

Any defense relating to the incurring, by the lessee, of the obligation, and to the default in it, for which the action has been brought, is as available to the surety, as, in an action by the lessor against the lessee, it would be to the latter; but in a cause of action of the lessee against the lessor, independent of the incurring of this obligation, and independent of such default, the surety is not entitled to interpose

§ 229. **Co-sureties.**—Touching co-sureties, it is said, “The obligation of one or two co-sureties is to pay the whole debt. The right of a surety is, if he pays the whole debt, to recover one-half from his co-surety, or the whole from the principal. If he pays less than the whole debt, he cannot recover from his co-surety, though he may from the principal, more than the amount which he has paid in excess of the moiety which, as between him and his co-surety, it was his duty to pay. A parol release of one surety would not discharge his co-surety, but a written release, or a discharge by operation of law of one surety will fully discharge his co-surety.”<sup>1</sup>

<sup>1</sup> Morgan v. Smith, 70 N. Y. R. 537, 543.

When suit is brought against obligors on an appeal bond and only one is served with process and no appearance is entered for the other, it is proper to take judgment against the one upon whom service is had. There is no force in the objection that judgment should have been rendered against both defendants or none.<sup>1</sup>

§ 230. **The defense of the surety.**—Where a surety is sued at law, he must, if he can, make his defense there, and if he neglects to do so he can not afterward have relief in chancery. It is a defense for a surety at law that the creditor has wrongfully deprived him of recourse to collateral security held by the creditor, to which the surety had the right of subrogation, and this even when the contract to which the surety is a party is under seal. In an action upon a contract, whatever, either at law, or by the rules of equity to which courts of law can give effect, operates to discharge or extinguish the claim upon the contract, is a defense thereto. The common law rule, that no specialty can be avoided but by an instrument of as high a nature, and that a judgment, being a security of the highest character, can not be avoided by a writing not under seal, has been departed from in this State only in so far as to allow defenses in actions upon contracts, analogous or equivalent to payment; and in actions upon instruments which are covered by the statute concerning negotiable instruments, want of, or fraud in the consideration is fatal to recovery; but as to a sealed instrument, not within that statute, fraud in the consideration can not at law be made a

<sup>1</sup> *Coursen v. Browning et al.*, 86 Ill. 57.

defense. Nor to such an instrument can it be made a defense at law that the parties have modified or changed it by a subsequent agreement not under seal; and this is so, though the defense is made by a surety, and the change is by a written but not sealed contract, upon adequate valuable consideration. Grounds of defense not pressed must be considered waived.<sup>1</sup>

<sup>1</sup> Hawkins v. Harding, 37 Ill. App. 565.

## CHAPTER XXII.

## FORMS.

Demand for possession.  
Notice to quit by an agent.  
Demand by an attorney.  
Notice to quit by the owner.  
Notice to terminate weekly tenancy.  
Ten days' notice to quit for default.  
Another form of notice to quit.  
Notice to quit for landlord by the agent.  
Landlord's five days' notice.  
Sixty day notice to terminate tenancy.  
Another form of the same.  
Sixty day notice to be served by an agent.  
Thirty day notice to terminate a tenancy from month to month.  
A demand for possession disclosing the agent.  
Written authority to agent or attorney.  
Written authority to attorney to sue, etc.  
Complaint in forcible entry and detainer in Illinois.  
Summons in forcible entry and detainer.  
Appeal bond in forcible entry and detainer.  
Writ of restitution.  
Agreement for a lease.  
Agreement not to obstruct lights.  
To renew a lease.  
Agreement of surety in lease.  
Agreement to let furnished apartments.  
Form of guarantee of rent, etc.  
Assignment and acceptance of lease.  
Assignment of lease.  
Consent to assignment.  
Assignment by lessor.  
New lease with full powers.



## DEMAND FOR POSSESSION.

To.....

I hereby demand the immediate possession of the following described premises: (describing them), now held by you.<sup>1</sup>

*RICHARD ROE.*

CHICAGO.....18....

## NOTICE TO QUIT BY AN AGENT.

To.....

You are hereby notified by me, the authorized agent (or attorney) of RICHARD ROE, and in his behalf, to quit and deliver up the possession of the following described premises: (describing them), held by you of the said RICHARD ROE.

Dated this.....day of....., A. D. 188...

*JOHN DOE,*

Authorized Agent for RICHARD ROE.

## DEMAND BY AN ATTORNEY.

To.....

I hereby demand the immediate possession of the following described premises: (describing them).

*RICHARD ROE.*

By JOHN DOE, his Attorney.

## NOTICE TO QUIT.

To.....

I hereby give you notice to quit and deliver up, on the..... day of....., A. D. 188..., the possession of the following described premises, now held by you of me: (Here describe premises).

*RICHARD ROE,*

Owner.

CHICAGO.....18....

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<sup>1</sup> Rev. Stat., chap. 57, sec. 3.

## NOTICE TO TERMINATE A WEEKLY TENANCY.

To.....

I hereby notify you to quit and deliver up, at the end of the next full week of your tenancy immediately succeeding the service of this notice, the possession of the following described premises, held by you of me: (describing them).

*RICHARD ROE.*

CHICAGO....., 18.....

TEN DAY NOTICE TO QUIT ON ACCOUNT OF DEFAULT  
IN TERMS OF THE LEASE.

To A. B.

You are hereby notified that, in consequence of your default in (here insert the character of the default) of the premises now occupied by you, being (here describe the premises), I have elected to determine your lease, and you are hereby notified to quit and deliver up possession of the same to me within ten days of this date.

CHICAGO.....day of....., 188...<sup>1</sup>

*C. D.*

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<sup>1</sup> Rev. Stat., chap. 80, sec. 9.

NOTE: Where the forfeiture of a lease is desired, it must be shown that the necessary acts to declare a forfeiture have been done by the landlord. A forfeiture will not be inferred, but all the requisite steps must be taken. *Cheney v. Bonnell*, 58 Ill. 268; *Cone v. Woodward*, 65 Ill. 477.

## NOTICE TO QUIT.

To Mr. C. D. (or if it be doubtful who is tenant, "To C. D. or whom else it may concern").

SIR: You will please take notice that you are hereby required to quit and deliver up, on the.....day of....., A. D., 18..., the possession of the house and premises (or "rooms and apartments," or "farm, lands, and premises") which you now hold of me, situated in the town (or "city," or "village") of....., in the county of....., and State of Illinois, more fully described as follows: (here insert the description, and where the time of the commencement of the tenancy is doubtful add, if not doubtful omit:) provided your tenancy commenced at that time of the year (or "month" or "week"): or otherwise that you quit and deliver up the possession of the house, etc., at the end of the year (or "month" or "week") of your tenancy, which shall expire next after the end of sixty (or thirty) days from the time of your being served with this notice.

Dated.....day of..... A. D., 18....

A. B.

## NOTICE TO QUIT FOR LANDLORD BY AN AGENT.

To Mr. C. D.:

SIR: I do hereby, as the agent for and in behalf of your landlord, A. B., of..... give you notice to quit and deliver up, etc. (as in last form), which you now hold of the said A. B., situated, etc.

Dated, etc.

Yours. etc.,

E. F.

Authorized agent for the said A. B.<sup>1</sup>

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<sup>1</sup> Moore's Justice, 860.

## LANDLORD'S FIVE DAY NOTICE.

FOR ILLINOIS.

To.....

You are hereby notified, that there is now due the sum of  
 .....Dollars and.....Cents, being rent for the premises  
 situated in the City of Chicago, in Cook County, in the State of  
 Illinois, and known and described as follows, viz:.....

.....  
 .....  
 .....  
 .....  
 .....

AND YOU ARE FURTHER NOTIFIED, that payment of said sum so  
 due, has been and is hereby demanded of you, and that unless  
 payment thereof is made on or before the.....day of  
 .....A. D. 18...., your Lease of said premises will be  
 terminated. ....is hereby authorized to receive  
 said rent, so due.

Dated this.....day of.....A. D. 188...

.....Landlord.

By.....Agent.

## SIXTY DAY NOTICE TO TERMINATE A YEARLY TENANCY.

To A. B.:

You will please take notice that you are required to quit and deliver up on the.....day of....., 18...., the possession of the following described premises, to wit: (describing them). which you now hold of me; or otherwise, that you quit and deliver up possession of the said premises at the end of the year of your tenancy, which shall expire next after the end of sixty days from the time of your being served with this notice.

CHICAGO,..... 18....

C. D.

Landlord and Owner.

## ANOTHER FORM.

To.....

You are hereby notified that I have elected to determine your tenancy of the following described premises, to-wit: (here describe premises), situated in the city of....., county of....., and State of Illinois, at the expiration of the current year, to-wit: on the.....day of....., 18...., and you are hereby notified and required to surrender the possession of the said premises to me on that day.

Dated at.....this.....day of..... 18....

A. B.

*If such notice is to be served by an agent, use the following:*

To A. B.:

You will please take notice that you are required to quit and deliver up, on the.....day of....., 18...., the following described premises, to wit: (describing them), which you now hold of me: or otherwise, that you quit and deliver up possession of the said premises at the end of the year of your tenancy, which shall expire next after the end of sixty days from the time of your being served with this notice.

And I hereby appoint.....my agent to serve this notice for me and in my behalf, and to receive possession of said premises of you for me.

Chicago, ....., 18....

A. B.

Landlord and Owner.

THIRTY DAY NOTICE TO TERMINATE A TENANCY FROM  
MONTH TO MONTH, OR FOR A GREATER PERIOD,  
BUT LESS THAN ONE YEAR.

To.....

You are hereby notified to quit and deliver up, at the end of the month of your tenancy, expiring immediately after the end of thirty days from the date of the service of this notice upon you, the possession of the following described premises held by you of me: (describing them).

Dated this.....day of....., A. D., 18....

*RICHARD ROE.*

FORM OF DEMAND DISCLOSING AGENT.

To JAMES M. NIXON:

Sir: You will please take notice that I demand immediate possession of those certain premises now occupied by you, known as (giving description), of which said premises you have possession under a certain lease, dated the 8th day of May, A. D., 1872, the same being from me to you, from the 9th day of May, A. D., 1872, for and during and until the 6th day of June, A. D., 1872, which said term has now expired. MR. JOEL LULL is hereby constituted my agent to receive such possession from you, and is authorized to, and will receive the same for me.

Yours, etc.,

*GEORGE NOBLE.*

Dated CHICAGO, June 7, 1872.

(See 70 Ill. 32.)

WRITTEN AUTHORITY TO AGENT OR ATTORNEY.

I hereby authorize JOHN DOE to make demand for, and receive possession of, the following described premises: (describing them), now in possession of.....

*RICHARD ROE.*

CHICAGO,....., 188...

WRITTEN AUTHORITY TO AGENT OR ATTORNEY.

I hereby appoint JOHN DOE my lawful agent (or attorney), with full power to do all acts and take all legal steps necessary to recover the possession, for me, of the following described premises: (describing them), now held by-----, and to receive possession of the same for me.

CHICAGO,-----, 188\_.

RICHARD ROE

## COMPLAINT IN FORCIBLE DETAINER.

(Under Act of 1874.)

STATE OF ILLINOIS, }  
-----COUNTY. } ss.

complain to.....Esq., a Justice of the Peace in and for  
said County and State, that he the said.....

entitled to the possession of the following described premises, in  
said County, to wit:-----

and that.....  
unlawfully withholds the possession thereof from the said.....

Wherefore he pray a summons, in pursuance of the Statute in such case made and provided.

Dated.....A. D., 18....





## APPEAL BOND IN FORCIBLE ENTRY AND DETAINER.

KNOW ALL MEN BY THESE PRESENTS, That we .....

of the District of ..... and State of Illinois, are held and  
firmly bound unto .....

in the penal sum of ..... Dollars, lawful money of the  
United States, for the payment of which well and truly to be  
made, we bind ourselves, our heirs, executors and administrators,  
jointly and severally, firmly by these Presents.

WITNESS our hands and seals, this ..... day of  
..... A. D., 18....

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, THAT  
WHEREAS, The said .....

did on the ..... day of ..... A. D. 18...., before  
..... Esq., a Justice of the Peace for the  
said District of ....., recover a Judgment against the  
above bounden ..... in an action for forcible

detainer of certain premises in said District, and for restitution  
thereof, and for costs of suit, from which said judgment the said  
..... ha...taken an appeal to the

..... Court of .....  
County, in the State aforesaid. Now, if the said .....

..... shall prosecute ..... appeal with effect,  
and pay all rent now due, and that may become due before the  
final termination of said suit, and all damages and loss which the  
plaintiff may sustain by reason of the withholding of the posses-  
sion of the premises, and by reason of any injury done thereto  
during such withholding, together with all costs, until the resti-  
tution of the possession thereof to the plaintiff; in case the Judg-  
ment from which the appeal is taken is affirmed, then the above  
obligation to be void, otherwise to remain in full force and effect.

TAKEN AND APPROVED BY ME this

..... day of ..... A. D. 18... } ..... [Seal.]

..... } ..... [Seal.]

Justice of the Peace. } ..... [Seal.]

(or Judge of the Circuit Court.) }



## AGREEMENT FOR A LEASE.

MEMORANDUM of an agreement made this day of....., 18 .., between A. B. of the one part, and C. D. of the other part.

The said A. B. agrees to grant, and the said C. D. agrees to take a lease of those premises, etc.,....., with the appurtenances, for the term of.....years, to commence and be computed from the.....day of.....next, inclusively, at the yearly rent of.....dollars, to be paid half yearly on the.....day of.....and on the.....day of.....

The said A. B., his heirs or assigns, will, at the request of the said C. D., his executors, administrators or assigns, execute a lease of the said premises to the said C. D., his executors, administrators or assigns, for the term and at the rent aforesaid, to be payable as aforesaid.

The said lease shall contain the following covenants:

[Here set out proposed covenants.]

A. B.

C. D.

## NOT TO OBSTRUCT LIGHTS, ETC.

And that the said party of the first part, his heirs or assigns, shall not, by building or otherwise, obstruct or darken any window or other source of light or air to the said premises.

## TO MAKE RENEWAL.

And that the said party of the first part, his heirs or assigns, will, at the expiration of the term of this lease, execute to the said party of the second part, his executors, administrators or assigns, a new lease of the said premises, upon his or their demand, for the further term of....years, for the yearly rent of.....dollars, payable.....: such new lease to contain the same covenants as this present lease.

## AGREEMENT OF SURETY.

In consideration of the execution of the within lease, and for and in consideration of the payment by the lessor of the sum of one dollar, receipt whereof is hereby acknowledged, I, the undersigned, do hereby guarantee to the said.....(the lessor), and to his heirs, executors, administrators and assigns, payment of the rent mentioned in the said lease, and also performance by....., the lessee, his executors, administrators and assigns, as well of the covenant (or agreement) to pay such rent as observance and performance of all the other covenants (or agreements) in the said lease contained, and on his or their part to be performed.

Dated, ....., 18.....

## AGREEMENT TO LET FURNISHED APARTMENTS.

Memorandum of agreement made and entered into this..... day of....., 18...., between A. B., of....., of the one part, and C. D., of....., of the other part. The said A. B. doth hereby agree to let to the said C. D., and the said C. D. doth hereby agree to take all those three rooms on the first floor of the dwelling-house situated, etc., and also all and singular the furniture, articles and effects now being in the said rooms respectively, and also the other articles and things comprised in the schedule hereunder written, for the term of six months, to be computed from the.....day of.....next, at the rent of .....dollars per month; and in consideration of the premises, the said C. D. doth agree, at the expiration of the said term, to deliver up the premises and furniture, articles and effects hereby agreed to be let, in as good a condition as the same now are in, reasonable wear and tear excepted, and that he shall and will duly replace all such parts thereof, respectively, as may be broken or injured by the said C. D. during his tenancy, the said A. B. not to do or suffer to be done, anything in the said house of a noisy, noxious, or offensive nature; *provided* that if at any time during the said tenancy the said C. D. shall be annoyed, vexed, or disturbed by anything of a noxious, noisy, or offensive nature contrary to the stipulations in that behalf above contained, then it shall be lawful for the said C. D., by notice in writing, to terminate the tenancy hereby created, and to quit possession of the said rooms without giving any previous notice to quit, anything hereinbefore contained to the contrary in any wise notwithstanding, and thereupon the said C. D. shall be liable to pay rent *pro rata* to the time of quitting.

[Annex schedule.]

(Signed)

A. B.

C. D.

## GUARANTEE.

For value received,.....hereby guarantee the payment of the rent and the performance of the covenants by the party of the second part in the within lease covenanted and agreed, in manner and form as in said lease provided.

Witness....hand..and seal..this.....day of.....A. D. 18...

.....[Seal.]

.....[Seal.]

## ASSIGNMENT AND ACCEPTANCE.

For value received.....hereby assign all.....right, title, and interest in and to the within lease unto.....heirs and assigns, and in consideration of the consent to this assignment by the lessor, .....guarantee the performance by said.....of all the covenants on the part of the second party in said lease mentioned.

In consideration of the above assignment and the written consent of the party of the first part thereto,.....hereby assume and agree to make all the payments and perform all the covenants and conditions of the within lease, by said party of the second part to be made and performed.

Witness....hand..and seal..this.....day of.....A. D., 188...

.....[Seal.]

.....[Seal.]

.....[Seal.]

## LESSOR'S ASSIGNMENT.

In consideration of One Dollar, to.....in hand paid,.....hereby transfer, assign, and set over to.....and assigns.....interest in the within lease, and the rent thereby secured.....

Witness....hand..and seal..this.....day of.....A. D. 188...

.....[Seal.]

## ASSIGNMENT OF LEASE.

*This Indenture*, Made on this.....day of....., in the year eighteen hundred and....., between....., of....., party of the first part, and....., of....., party of the second part, witnesseth: That the said....., party of the first part, for and in consideration of the sum of..... dollars, lawful money of the United States of America, to him in hand paid, receipt whereof is hereby acknowledged, hath assigned and sold, and hereby doth assign, sell, transfer and set over unto the said party of the second part, and to his executors, administrators and assigns, a certain indenture of lease of premises known as....., which lease bears date on the.....day of....., in the year one thousand eight hundred and....., and was executed by one....., to the said....., party of the first part hereto, to have and to hold the same and all rights thereunder for the unexpired term of the said lease, unto the said party of the second part, his executors, administrators and assigns, subject, however, to the covenants, conditions, exceptions and reservations therein contained.

In witness whereof, the said party of the first part hereto hath hereunto set his hand and seal on the day and in the year first above written.

Sealed and delivered ) in presence of ) .....	.....[Seal.]
---	--------------

## CONSENT TO ASSIGNMENT.

.....hereby consent to the assignment of the within lease to..... on the express condition, however, that the assignor shall remain liable for the prompt payment of the rent and performance of the covenants on the part of the second party as therein mentioned, and that no further assignment of said lease or sub-letting of the premises or any part thereof shall be made without..... written assent first had thereto.

Witness...hand...and seal...this.....day of.....A. D., 188...  
 .....[Seal.]

## NEW LEASE WITH FULL POWERS.

*This Indenture*, Made this .....day  
of.....in the year of our Lord One Thousand  
Eight Hundred and Eighty.....Between  
.....party  
of the first part, and.....  
.....party of the second part.

WITNESSETH, That the party of the first part, for and in con-  
sideration of the covenants and agreements hereinafter mentioned,  
to be kept and performed by the party of the second part, has  
demised and leased to the party of the second part the premises  
in the City of Chicago, County of Cook, and State of Illinois,  
known and described as follows:

.....  
.....  
.....  
.....  
.....  
.....  
.....  
.....  
.....

to be occupied.....  
and for no other purpose whatever.

TO HAVE AND TO HOLD the same unto the party of the second  
part, from the.....day of.....  
A. D. 188.., until the.....day of.....  
A. D. 188...

And the party of the second part, in consideration of said

demise, does covenant and agree with the party of the first part as follows:

FIRST. To pay as rent for said demised premises the sum of .....Dollars,  
payable in.....installments of  
.....Dollars,  
.....  
.....

each in advance upon the first day of each and every month of  
said term at the office of.....CHICAGO, ILL.

SECOND. That he has examined and knows the condition of said premises, and has received the same in good order and repair, except as herein otherwise specified, and that no representations as to the condition or repair thereof have been made by the party of the first part or the agent of said party, prior to or at the execution of this lease, that are not herein expressed or indorsed hereon; and that he will keep said premises in good repair, replacing all broken glass with glass of the same size and quality as that broken; and will keep said premises and appurtenances, including catch-basins, vaults, and adjoining alleys, in a clean and healthy condition, according to the city ordinances, and the direction of the proper public officers, during the term of this lease, at his own expense; and will, without injury to the roof, remove the snow and ice from the same when necessary, and clean the snow and ice from the sidewalks in front of said premises; and upon the termination of this lease, in any way, will yield up said premises to said party of the first part in good condition and repair (loss by fire and ordinary wear excepted), and deliver the keys at the office of.....  
.....

THIRD. That the party of the first part shall not be liable for any damage occasioned by failure to keep said premises in repair, and shall not be liable for any damage done or occasioned by or from plumbing, gas, water, steam or other pipes, or sewerage, or the bursting, leaking or running of any cistern, tank, wash-stand,



water-closet or waste pipe in, above, upon or about said building or premises, nor for damage occasioned by water, snow or ice being upon or coming through the roof, skylight, trap door or otherwise, nor for any damages arising from acts or neglect of co-tenants or other occupants of the same building, or of any owners or occupants of adjacent or contiguous property.

FOURTH. That he will not allow said premises to be used for any purpose that will increase the rate of insurance thereon, nor for any purpose other than that hereinbefore specified, nor to be occupied, in whole or in part, by any other person, and will not sub-let the same nor any part thereof, nor assign this lease without, in each case, the written consent of the party of the first part first had, and will not permit any transfer, by operation of law, of the interest in said premises acquired through this lease; and will not permit said premises to be used for any unlawful purpose, or purpose that will injure the reputation of the same or of the building of which they are a part, or disturb the tenants of such building or the neighborhood; and will not permit the same to remain vacant or unoccupied for more than ten consecutive days; and will not permit any alteration of or upon any part of said demised premises, nor allow any signs or placards posted or placed thereon, except by written consent of first party; all alterations and additions to said premises shall remain for the benefit of the lessor unless otherwise provided in said consent as aforesaid.

FIFTH. To pay (in addition to the rents above specified) all water rents and gas bills taxed, levied or charged on said demised premises, for and during the time for which this lease is granted, and in case no water rents are levied specifically upon said premises, to pay the.....part of all water rents levied or charged upon the building in which said demised premises are situated; and in case said water rates and gas bills shall not be paid when due, said party of the first part shall have the right to pay the same, which amount so paid, together with any sums paid by said party of the first part to keep said premises and their appurtenances in a clean and healthy condition, as hereinbefore specified, are hereby declared to be so much additional rent, and shall be due and payable with the next installment of rent due thereafter under this lease.

SIXTH. To allow the party of the first part free access to the premises hereby leased for the purpose of examining or exhibiting the same, or to make any needful repairs or alterations of said premises which said first party may see fit to make; also to allow to have placed upon said premises, at all times, notice of "For Sale" and "To Rent," and will not interfere with the same.

SEVENTH. If said party of the second part shall abandon or vacate said premises, the same shall be re-let by the party of the first part for such rent and upon such terms as said first party may see fit; and if a sufficient sum shall not be thus realized, after paying the expenses of such re-letting and collecting, to satisfy the rent hereby reserved, the party of the second part agrees to satisfy and pay all deficiency.

EIGHTH. At the termination of this lease, by lapse of time or otherwise, to yield up immediate possession to said party of the first part, and failing so to do, to pay as liquidated damages, for the whole time such possession is withheld, the sum of ..... dollars per day; but the provisions of this clause shall not be held as a waiver by said first party of any right of re-entry as herein-after set forth; nor shall the receipt of said rent or any part thereof, or any other act in apparent affirmance of the tenancy, operate as a waiver of the right to forfeit this lease and the term hereby granted for the period still unexpired, for any breach of any of the covenants herein.

.....  
.....  
.....  
.....  
.....  
.....  
.....  
.....

IT IS EXPRESSLY AGREED, Between the parties hereto, that if

default be made in the payment of the rent above reserved, or any part thereof, or in any of the covenants and agreements herein contained, to be kept by the party of the second part, it shall be lawful for the party of the first part or the legal representatives of said party, at any time thereafter, at the election of said first party, or the legal representatives thereof, without notice, to declare said term ended, and to re-enter said demised premises, or any part thereof, either with or without process of law, and the said party of the second part or any person or persons occupying the same to expel, remove and put out, using such force as may be necessary so to do, and the said premises again to re-possess and enjoy, as before the demise, without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenants; and said party of the second part further covenants and agrees that said party of the first part, or the representatives or assigns of said party, shall have, at all times, the right to distrain for rent due, and shall have a valid and first lien upon all property of said party of the second part, whether exempt by law or not, as security for the payment of the rent herein reserved.

The party of the second part hereby irrevocably constitutes \_\_\_\_\_ or any attorney of any court of record of this State, attorney for him in his name, on default by him of any of the covenants herein, and upon complaint made by said first party, his agent or assigns, and filed in any such court, to enter his appearance in any such court of record, waive process and service thereof, and trial by jury, and confess judgment against him in favor of said party of the first part, or his assigns, from time to time, for any rent which may be due to said party of the first part, or the assignees of said party, by the terms of this lease, with costs and \_\_\_\_\_ dollars attorney's fees, and to waive all errors, and all right of appeal from said judgment and judgments, and to file a consent in writing that a writ of restitution or other proper writ of execution may be issued immediately; said party of the second part hereby expressly waiving all right to any notice or demand under any statute in this State relating to forcible entry and detainer.

IT IS FURTHER AGREED by the parties hereto that, after the service of notice, or the commencement of a suit, or after final

judgment for possession of said premises, the first party may receive and collect any rent due, and the payment of said rent shall not waive or affect said notice, said suit or said judgment.

In case said premises shall be rendered untenable by fire, or other casualty, the lessor may at his option terminate this lease, or repair said premises within thirty days, and failing so to do, or upon the destruction of said premises by fire, the term hereby created shall cease and determine.

The party of the second part further covenants and agrees to pay and discharge all reasonable costs, attorney's fees and expenses that shall be made and incurred by the party of the first part in enforcing the covenants and agreements of this lease; and all the parties to this lease agree that the covenants and agreements herein contained shall be binding upon, apply and inure to their respective heirs, executors, administrators and assigns.

WITNESS the hands and seals of the parties hereto, the day and year first above written.

In presence of	}	.....[Seal.]
		.....[Seal.]
.....		.....[Seal.]

## SHORT COUNTRY LEASE.

*This Indenture*, Made this.....day of.....,  
A. D. 189..., between.....

.....  
party of the first part, and.....

.....party of the second part,  
WITNESSETH, that the party of the first part, in consideration of  
the covenants of the party of the second part, hereinafter set  
forth, do....by these presents, lease to the party of the second  
party, the following described property, to-wit: .....

.....in the  
.....County of.....and State of .....

TO HAVE AND TO HOLD THE SAME to the party of the second part.  
from the.....day of....., 189..., to the  
.....day of....., 189.... And the party  
of the second part, in consideration of the leasing the premises as  
above set forth, covenants and agrees with the party of the first  
part to pay the party of the first part, at.....  
as rent for the same, the sum of.....dollars,  
payable as follows, to-wit:.....

AND THE PARTY OF THE SECOND PART covenants with the party



heirs, executors and administrators of the parties to this lease,

WITNESS THE HANDS AND SEALS of the parties aforesaid, the day and year first above written

-----[Seal.]

-----[Seal.]

SKELETON LEASE.

*This Indenture, Made this* ..... *day of* ..... *in*  
the year of our Lord one thousand eight hundred and eighty.....  
*between*.....

of the first part, and.....

..... of the second part.

WITNESSETH, that the said party of the first part, for and in consideration of the rents, covenants and agreements hereinafter mentioned, to be kept and performed by the said party of the second part, ..... executors, administrators and assigns, ha....demised and leased, and by these presents do....demise and lease unto the said party of the second part,.....executors, administrators and assigns, all those premises lying and being in.....in the County of.....and State of .....known and described as follows, to wit:.....

TO HAVE AND TO HOLD the said demised premises, with the

appurtenances, unto the said party of the second part,.....  
 executors administrators and assigns, for and during the term of  
 .....from the .....day of .....in the  
 year of our Lord one thousand eight hundred and eighty.....  
 for and during, until.....

.....And the said party of the second part,  
 in consideration of the leasing of the premises aforesaid, by the  
 said party of the first part to the said party of the second part,  
 does covenant and agree with the said party of the first part,....  
 heirs, executors, administrators and assigns, to pay the said party  
 of the first part, as rent for the said demised premises, the sum  
 of.....

IT IS AGREED, By the said party of the second part, that neither  
 .....nor .....legal representatives, will underlet said  
 premises, or any part thereof, or assign this lease, without the  
 written assent of said party of the first part first had and obtained  
 thereto, and that.....will not use or permit the said premises  
 to be used for any purpose prohibited by the laws or ordinances  
 of the town, city, county or state where situated, or for any  
 hazardous purpose whatever, or purpose calculated to increase the  
 insurance.

AND THE SAID PARTY OF THE SECOND PART further covenants



with the said party of the first part, that said second party has received said demised premises in good order and condition, and at the expiration of the term in this lease mentioned..... will yield up the said premises to the said party of the first part in as good order and condition as when the same were entered upon by the said party of the second part, loss by fire, or inevitable accident, or ordinary wear excepted; and also will keep said premises in good repair during this lease, at.....own expense. *Provided always*, and these presents are upon the express condition, that if it shall so happen that the rent above reserved, or any part thereof, be behind or unpaid at the times or on the day or days above mentioned for the payment thereof, or in case of the non-performance of any of the covenants made by the said party of the second part, at any of the times mentioned for the performance thereof, then and from thenceforth it shall and may be lawful for the said party of the first part,..... heirs and assigns, into the said demised premises, or any part in the name of the whole to re-enter, and the same to have again, retain, re-possess and enjoy, and the said party of the second part, .....heirs, executors, administrators or assigns, and all others, tenants or occupiers of the said premises hereby demised, or any part thereof, thereout or therefrom, utterly to expel, put out and remove; and from and after such re-entry made, this lease, and every part thereof, shall cease and be absolutely void, as it respects the covenants to be performed by the said party of the first part. And the said party of the first part, for..... heirs and assigns, do.....hereby covenant and agree to and with the said party of the second part,.....heirs, executors, administrators or assigns, paying the rent above reserved in manner aforesaid, and observing, keeping and performing all and singular the covenants and agreements hereinbefore mentioned on .....and their parts to be kept and performed, shall and may peaceably and quietly have, hold, occupy, possess and enjoy the said demised premises, with the appurtenances, for and during the said term, without any lawful let, quit, hindrance or molestation, to the said part.....of the first part,..... heirs and assigns, or any other person or persons claiming or to claim, by, from or under him or them, or any other person or persons having or lawfully claiming any right in the said premises.

AND IT IS FURTHER COVENANTED AND AGREED, by and between

the parties, that the party of the second part shall pay and discharge all costs and attorneys' fees and expenses that shall arise from enforcing the covenants of this lease by the party of the first part.

IN WITNESS WHEREOF, the parties hereunto have interchangeably set their hands and seals, the day and year first above written.

Signed, sealed and delivered	.....	[Seal.]
in presence of	.....	[Seal.]
.....	.....	[Seal.]
.....	.....	[Seal.]

# INDEX.

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## A

	PAGE
ABANDONMENT.	
abandonment of possession.....	113
not eviction without.....	250, 249
must pay rent or go out.....	251
tenant may abandon for failure to repair.....	202
ACCEPTANCE OF PREMISES—DELIVERY OF KEY.	
delivery of key as indicating a termination of the tenancy.....	126
effect of delivering key and paying rent after suit brought.....	126
ACCRUING RENT.	
unqualified conveyances pass rent accrued.....	42
who entitled to collect rents on sale.....	42
accruing rent not reserved passes.....	42
but not collectible until attornment.....	42
accepting rent from assignee does not discharge lessee.....	43
landlord may accept assignee as sole tenant.....	43
landlord estopped to collect after surrender.....	43
lessor's consent to assignment does not discharge tenant from rent.....	43
what the tenant may show as to assignment of lease.....	44
rent not collectible contrary to Statute of Frauds...	44
landlord entitled to rent until conveyance.....	44
administrator cannot collect rents.....	44
rent belongs to the heirs.....	45
when assignment of lease void or voidable.....	45, 46
how it affects assignee.....	45
assignee of lease acquires equitable title to rents.....	45

	PAGE
ACCRUING RENT—Continued.	
covenants in a lease pass with it to the new owners.....	46
rights of the landlord in case of voidable assignment.....	46
an agreement not to under-let does not prevent assignment.....	46
ACTION—NATURE OF THE.	
in some states parties indicted.....	62
liberty regulated by law.....	62
the object of this action to preserve the peace.....	62
it forbids taking forcible possession.....	62
in the State of Illinois a civil proceeding.....	63
an action at law relating to real property.....	63
most generally a civil proceeding alone.....	63
the remedy two-fold.....	63
indictment at common law.....	63
proceedings under the Statute.....	63
the common law affords no civil remedy.....	63
no writ of restitution awarded in a criminal proceeding.....	64
if no statute on the subject an indictment may be had.....	64
the only issue to be tried.....	92
the party entitled to possession should be plaintiff..	92
the questions that go to make up the issue..	92
what possession is required.....	93
as to the possession of unoccupied lands.....	76, 93
what lands embraced in premises.....	93
statutory provisions.....	67
what a forcible entry means.....	67
taking possession by force forbidden.....	67
a party wrongfully kept out has no right to resort to force.....	67
the Missouri law as to force.....	67
if a tenant agrees to leave on a particular day, the landlord has no justification in ousting him by force.....	67
if the tenant vacates the landlord can break open his own house.....	68

## ACTION—NATURE OF THE—Continued.

any expulsion by force illegal..... 68

## ACTION—WHO MAY MAINTAIN.

the action lies only to obtain possession of real property..... 96

the only one who can make complaint..... 96

lawful possession must be averred in plaintiff..... 96

the capacity in which he holds not important..... 97, 101

devisee, when grantor of lessor, may maintain the action..... 97

right of action vests in the party whose possession has been invaded..... 97

one in actual possession claiming the fee may maintain the action..... 97

the right or the wrong of the possession unimportant..... 97

the action will lie against the owner who obtained possession by collusion..... 97

only party entitled to possession at the commencement of the suit can sue..... 98

a stranger to a decree turned out by virtue of the decree may bring action..... 98

one joint tenant can not recover exclusive possession of another..... 98

one who has possession for the owner may maintain the action..... 98

## ACTION WHEN JUDICIAL SALE HAS BEEN MADE.

where the premises have been sold at judicial sale... 86

the sixth statutory cause of action..... 86

this action lies where lands and tenements have been conveyed by grantor in possession under a judgment or decree..... 86

when sold under a power of sale in a mortgage.... 86

demand in writing must be made ..... 86

right of action under a judicial sale..... 86

right of action under a trust deed or mortgage.... 85

date of title at foreclosure sale..... 86

purchaser at foreclosure sale not bound by mortgagor's lease..... 87

	PAGE
<b>ACTION WHEN JUDICIAL SALE HAS BEEN MADE—Continued.</b>	
against whom the action will lie under this clause.	87
what the plaintiff must prove to sustain the action.	87
writ of possession and forcible detainer concurrent remedies .....	87
who liable for detention of premises after sale.....	87
against whom suit brought.....	88
only against party to judgment.....	88
in these actions the title is put in issue... ..	88
the evidence to support the action.....	88
judgment, execution and sheriff's deed.....	88
these are indispensable requisites.....	88
demand of possession must be made.....	89
plaintiff must show that defendant got possession under party to the trust deed.....	89
what must be proved to recover in this action.....	89
a stranger to the judgment liable if his right acquired subject to the judgment lien.....	89
otherwise he is not liable.....	90
plaintiff must show privity of estate between the defendant and mortgagor.....	90
when third parties may be restored to possession....	90
if a tenant attorns to the purchaser the relation of landlord and tenant is created.....	90
what notice required before commencing suit under this section.....	90
demand in writing only need be made.....	91
<b>ACTION WILL LIE—AGAINST WHOM THE.—</b>	
the general rule.....	104
will lie against tenant or any person claiming under him.....	104
if a party direct others to take possession he is liable.....	104
a sub-tenant occupies the place of the tenant and is liable to the action.....	104
party entering in good faith not liable.....	105
defendants—who included as.....	105
result of a party ousted by mistake... ..	105
a tenant continuing in possession after notice of new terms is liable.....	105

	PAGE
ACTION WILL LIE—AGAINST WHOM THE.—Continued.	
action will lie against a city.....	107
the tenant or any one claiming under him liable..	71
person making the forcible entry and any one coming in under him, collusively, is liable.....	71, 82
an occupant in good faith can not be made a wrongdoer.....	72, 74
a breach of the peace is not necessary to constitute a forcible entry.....	72, 73
opening a gate and removing property is a forcible entry.....	72
in case lease authorizes entry by landlord.....	73
detention after demand unlawful.....	73
payment of taxes not proof of ownership.....	73
acts of ownership not amounting to actual possession insufficient.....	74
acts implying title do not prove possession.....	74
acts indicating ownership which will not support the action.....	74
permission by a father to his son for a long time is not sufficient possession.....	74
a license that may be revoked by notice, insufficient to support the action.....	75
entry into vacant lands.....	75
the action will lie for entry into vacant lands or tenements.....	75
what acts constitute possession of unoccupied land...	76
the owner of unoccupied lands deemed to have possession.....	76
pre-emption claims without occupation insufficient...	76
AGAINST A TENANT HOLDING OVER.	
fourth cause of action under the Statute.....	76
against a tenant holding over after the termination of lease.....	76-73
how far the possession of tenant will avail the landlord.....	76
a party procuring possession by fraud liable.....	77
possession confided to the tenant must not be tampered with.....	77

## AGAINST A TENANT HOLDING OVER—Continued.

PAGE

tenant should not betray the interest of the land- lord.....	77
tenant must act in good faith to his landlord.....	77

## ACTION WILL NOT LIE.

will not lie to recover an incorporeal right .....	106
will not lie for possession of a ferry.....	106
does not lie for forcible entry of a weir.....	106
will not lie to recover personal property.....	106
when wife is not a necessary party.....	106
will not lie against several defendants on one demand .....	106
or against two or more who held in severalty .....	106
where several tenants how rent should be paid.....	107
Illinois Statute compared with English Act.....	107
if plaintiff has parted with the actual possession.. he can not maintain the action.....	107
the action will not lie against the claimant not in possession .....	107

## ACTIONS FOR RENT.

meaning of the term debt.....	214
rent reserved in a lease is a debt.....	214
the amount of rent furnishes the measure of damages..	214
a party holding as owner not liable for use and occupation .....	215

## AGENCY.

notice by agent must discover.....	121
how proven.....	124
case on a sufficiency of notice.....	124
attorney in fact may act by another.....	124
a weekly tenancy terminated by one week's notice..	124
notice should be fixed by the rent day.....	124
in case of tenancy at will notice proper evidence...	125
tenancy at will terminated by demand only.....	125
parol tenancy from year to year terminated by sixty days notice.....	125
lease terminated by the death of the lessor... ..	125
no notice required where lease expires by its terms..	125



	PAGE
<b>AGENT.</b>	
authority of, must be under seal, when.....	3
may distrain for rent.....	121, 275
when possession of husband as, of wife.....	191
may sign and serve notice to quit.....	122
authority of, must be proved on trial.....	121
written authority to.....	280
form of notice to quit by.....	275, 279
form of demand disclosing.....	275
<b>AMENDMENT.</b>	
of complaint, when should be made.....	143
of proceedings may be allowed in discretion court..	143
may be made before or after verdict.....	143
<b>APARTMENTS.</b>	
lodger not justified in quitting, without notice.....	26
when separate, considered distinct mansion houses..	26
<b>APPEAL AND APPEAL BONDS.</b>	
defendant's appeal bond.....	259
plaintiff's appeal bond.....	259
new bonds.....	260
writ of restitution.....	260
appeal bond indispensable.....	260
failure to file appeal bond in five (5) days fatal.....	261
court must fix the amount of bond.....	261
what defects cured by the appeal.....	261
irregularity waived by going to trial.....	261
bond—by whom approved.....	262
form of bond.....	283
<b>APPEAL BOND—CONDITIONS OF.</b>	
controlled by the judgment of the court below.....	265
appeal operates as a supersedeas.....	266
defective appeal bond may be amended.....	266
what damages in appeal bond mean.....	266
what the appeal bond should be.....	266
defects as to seal and penalty may be amended.....	266
useless conditions in appeal bonds simply surplusage..	266
upper court can not enter judgment against surety on appeal bond on dismissal.....	267

## APPEAL BOND—CONDITIONS OF.—Continued.

PAGE

damages other than the rental value not recoverable.....	267
conditions not required by the statute void.....	267
appeal bond should cover accruing rents.....	267
bond not providing for accruing rents insufficient...	267
defendant can not appeal until bond fixed by the court.....	267
new bonds in larger amounts may be taken.....	268
instances of insufficient bonds.....	268

## APPURTENANCES.

include what.....	50
unconnected property not included.....	51

## ASSIGNEE.

has same rights as original landlord.....	40
of tenant, has same rights as original tenant.....	40
of reversion, when not liable on covenants in lease...	42
when right of action will not pass to.....	42
has right of action to recover possession.....	41

## ASSIGNMENT OF THE LEASE.

leases assignable.....	40
if assignment forbidden lease still not void.....	40
assignment contrary to lease voidable.....	40
landlord may assign the rent to accrue.....	40, 42
assignee of rent may collect in his own name.....	40
title can not be assigned on lease.....	40
a recognized assignee can sue for rent.....	40
how equity treats an assignment of lease.....	41
how assignment can be made.....	41
lessee has power to assign the lease unless forbidden in lease.....	41
results if tenant assign contrary to lease.....	41
a void assignment becoming executed stands.....	41
an agreement in a lease runs with the land.....	41
lessor may convey parts of his reversion.....	42
such covenants to convey are divisible.....	42
result when lessor conveys pendente lite.....	42

## ATTORNMMENT.

PAGE

what attornment means.....	38
payment of rent a sufficient attornment.....	38
where the landlord sells the fee.....	38
when the grantee authorized to sue for rent.....	38
purchaser can not collect rent without attornment..	39
result of attornment to another than the lessor.....	39
promise of the tenant to pay rent sufficient.....	39
the tenant's right to attorn to owner.....	39
attornment acknowledges the new landlord.....	39
possession must be surrendered to landlord before attornment.....	39

## B

## BOARDING HOUSE.

distinction between inn and.....	27
liability for negligence.....	30

## BONDS.

appeal bonds.....	259
new bonds.....	260
bond indispensable for appeals.....	260
bonds—by whom approved.....	262
bonds—conditions of.....	265

## BOUNDARIES.

deeds may be used to show.....	165
--------------------------------	-----

## C

## COMPLAINT, THE.

the complaint is the foundation of the action.....	142
must describe the property with reasonable cer- tainty.....	142
instances of insufficient description.....	143
the statute provides what it should be.....	143
if defective objection when made.....	143
amendment should be made in lower court.....	143
a motion to quash filed in lower court.....	143
no law requiring justices of the peace to mark the papers filed.....	143
the clerk of the higher court or the justice may issue summons.....	144

## COMPLAINT, THE.—Continued.

PAGE

must show that the relation of landlord and tenant existed.....	81
it must show the holding over after demand .....	81
must show facts that presume a tenancy.....	81
a sub-lessee liable to eviction in this action.....	81
in trial, the holding over proven.....	81
extent of right in such case.....	82
against a purchaser who fails to comply with the contract of purchase.....	82
the fifth statutory cause .....	82
when the action will lie.....	82
written demand must be made.....	82
possession of defendant may be by himself or others under him.....	82
vendor can bring action under this clause.....	82
purchaser can not deny vendor's right.....	83
relation of vendor and vendee must exist.....	83
possession must have been under contract of purchase.....	83
must be a failure to comply with the contract.....	83
must be before obtaining a deed to the premises.....	83
where a deed is made as a mortgage the mortgagee is not liable.....	83
must be a contract of purchase.....	83
four essentials to sustain this action.....	83
what proper evidence in the action.....	83
action fails unless essential elements proven.....	83
the action will lie under the Act of 1861.....	84
others claiming under the vendee stand in his shoes	85
the grantee of the vendee can claim no greater rights than his grantor.....	85
land conveyed for the security of money is not a purchase.....	85
any reservation is inconsistent with an absolute deed .....	85

## COMPLAINT, DATE OF.

a mistake of years in date is immaterial.....	161
restitution awarded on dismissal of appeal.....	161

## COMPLAINT, DATE OF.—Continued.

PAGE

the death of defendant after suit brought is no bar to recovery.....	161
judgments against defendants should be several, not joint.....	161
one action will not lie against two holding in severalty.....	161
notice in writing the same except names are original duplicates.....	162
color of title a question of law.....	161

## COMPLAINT SHOULD CONTAIN, WHAT THE.

must show right of possession at the commencement of the action.....	145
need not allege the estate held by plaintiff.....	145
must show actual or constructive possession.....	145
that the relation of landlord and tenant existed....	145
complaint should describe the premises properly....	145
should not follow erroneous description in the lease..	145

## CO-PARTNER.

one cannot dispossess his co-partner.....	195
---	-----

## COVENANTS.

covenants defined.....	20
a stipulation under seal.....	20
a covenant belongs to the party making it.....	20
the stipulation taken as the language of the one who is bound to perform it.....	20
party can not recover on a contract until it is performed.....	20
the jury alone are the judges whether performed or not.....	20
the word "demise" imports that lessor has a right to make the lease; it also implies a covenant for quiet enjoyment.....	20
demise imports a legal estate in the lessor.....	21
a tenant ejected from the demised premises by adverse title is discharged from rent.....	21
a covenant for quiet enjoyment assures a legal entry and enjoyment after entry.....	21

## COVENANTS.—Continued.

PAGE

covenant of landlord of legal entry is not broken by the entry of a party who does not claim an adverse title.....	21
covenants may be for landlord only.....	34
thirty dollars per day stipulated damages sustained..	21
tenant must yield possession, notwithstanding pend- ing negotiations for a new lease.....	22
privilege to store cases in basement is not a leas- ing of the same.....	22
the covenant arising from a "demise" explained....	22

## COVENANTS, IMPLIED.

the implied covenant for quiet enjoyment does not oblige lessor to put lessee in possession.....	22
if tenant kept out by act of the landlord he has a right of action for damages.....	23
rule as to damages.....	23
what the law implies as to quiet enjoyment.....	23
the implied covenant of tenant as to waste and nuisance .....	23
the same as to cultivation of ground.....	23
waiver of demand and notice by the tenant in the lease sustained.....	23
former tenant holding over does not release the new tenant from rent.....	23
the lessee having the right of possession must assert his rights.....	24

## CO-SURETIES.

the obligation of each is to pay the whole debt....	271
if one pays the whole debt the co-surety is liable for his share.....	271
principal is liable to sureties for the whole amount...	271
a parol release of one surety will not release the co-surety.....	271
a written release of one surety will discharge his co-surety.....	271
in a suit against sureties judgment may be taken against one.....	271

## CO-SURETIES.—Continued.

PAGE

judgment need not be rendered against both defendants .....	271
---	-----

## D

## DAMAGES.

damages can not be allowed in the action.....	217
gaining possession the only object of the suit.....	217
only judgment is for possession.....	217
verdict assessing damages at one cent sustained....	218
damages caused by negligence of landlord.....	218
such damages not the subject of recoupment.....	218
liquidated damages specified in lease for holding over is valid and not a penalty.....	219
a set off of the damages through a defective water pipe properly admitted in an action for rent....	219
failure to make repairs as agreed a matter of defense against rent.....	219
tenant's damage for failure to repair in time agreed proper set off.....	220
if a landlord fails to deliver lease tenant may sue for specified performance or for damages for breach of contract.....	220
the measure of damages the value of the lessee's bargain and any other special damage.....	220
leasing premises with the knowledge that they are infected with disease creates liability, in such case tenant can abandon lease.....	221
tenant of life estate must pay taxes.....	221

## DAMAGES BY WATER.

landlord does not warrant that the premises should be fit for occupant.....	209
is not liable for water damages from upper floor....	209
tenant having the use of pipes and crank can not recover damages if he neglects his duty.....	209
landlord liable for injuries caused by his own negligence.....	209
tenant who takes premises with a defective water pipe can not recover damages in consequence of the defect.....	210

	PAGE
DAMAGES BY WATER.—Continued.	
landlord is answerable as occupant not as landlord if he lives in same building and causes damage by his negligence.....	210
damages by one's own negligence can not be recov- ered of another.....	210
DAMAGE FOR WANT OF REPAIRS.	
landlord liable when premises rented in a dangerous condition.....	207
landlord liable for renting premises with a nuisance on them.....	207, 208
landlord not liable to third party unless he agreed to repair.....	208
landlord liable if he agreed to repair or lets prem- ises with a nuisance on them.....	208
if a tenant creates a nuisance landlord may abate it to abate a nuisance by a bill in chancery it must be a clear strong case.....	208
DEATH.	
action abates on death of defendant.....	65
death of defendant after suit brought no bar to re- covery.....	161
DEMAND OF POSSESSION—RETURN—FORM.	
how demand may be served .....	115
how served on vacant premises.....	115
the officer's return <i>prima facie</i> evidence.....	115
a person not an officer must make affidavit of service	115
demand may be made by an authorized agent.....	115
DEMAND IN WRITING.	
is necessary where double rent claimed.....	116
must be signed by the owner, his agent or attor- ney.....	116, 121, 122
made after expiration of lease .....	116
before that unavailing.....	117
on same day suit brought sufficient.....	117
need not be made any specific time before the com- mencement of suit.....	117
what the demand should contain.....	121



	PAGE
DEMAND IN WRITING.—Continued.	
demand by agent must disclose agency.....	122
notice should be left with occupant.....	122
a notice that tenant can examine.....	122
what is sufficient service of notice to quit.....	122
reading notice to tenant not sufficient.....	122
a notice posted on door sufficient—when.....	122
what notice by agent should be.....	123
DESCRIPTION DEFECTIVE.	
can not be supplied by parol proof.....	180
wrongful withholding the gist of the action must be proven.....	180
proof of refusal to surrender premises necessary....	181
lease is proper evidence in appeal cases.....	181
proof of rent of an adjoining lot allowed.....	181
declarations of party in possession admissible against him.....	182
such declarations part of the <i>res gestae</i> .....	182
DESCRIPTION OF PREMISES REQUIRED.	
must be sufficiently accurate to identify the premises	146
must be such that premises can be located by a sur- veyor.....	146
sufficient if the property can be readily identified by the description.....	146
instances of insufficient description.....	147, 148
DISMISSAL.	
appeals may be dismissed by circuit court.....	186
DISTRESS FOR RENT.	
rent defined.....	228
must be certain in amount and nature.....	228
need not be payable in money.....	229
must be for some definite time.....	229
when payable monthly or quarterly—the election belongs to landlord.....	229
rent reserved payable in advance collected accordingly	229
notion that rent can not be collected until end of the month a mistake.....	229
provisions of lease govern.....	229

	PAGE
DISTRESS FOR RENT—Continued.	
place of payment—premises.....	229
time of payment—the end of the lease unless other- wise provided.....	229
landlord may distrain rent due.....	229
set off against rent—cases in which this applies.....	230
rent collected if distress warrant insufficient.....	230
taking security does not waive right to distrain.....	230
tenant may maintain trover.....	231
no distress if no tenancy.....	231
rent not recoverable if tenant deprived of premises by landlord.....	231
growing crops may be seized if tenant abandons premises whether rent due or not.....	231
with this exception distress lies only for rent due...	231
DISTRESS WARRANT AND EXECUTION CONSIDERED.	
distress warrant after the levy of an execution is a secondary lien.....	233
levy by distress subject to lien of prior execution...	233
otherwise in growing crops.....	233
if property converted by landlord tenant must plead set-off.....	233
when tenant may recoup against illegal distress.....	233
landlord may levy on chattel mortgage property....	233, 234
such levy is not trespass.....	234
in trial of distress cases tenant may set-off damages for injury to use of premises.....	234
right to distrain arises at common law.....	234
a levy without taking possession is insufficient.....	234
DISTRESS LIMITED TO AMOUNT CLAIMED IN WAR- RANT.	
landlord can not recover more than claimed in dis- tress warrant.....	235
what he can show on trial.....	236
tenant may reduce the amount by proof.....	236
DISTRESS CASES—TRIAL IN.	
amount of rent fixed by trial binding on all parties.	238
is error to award a special execution.....	238
what the court should ascertain.....	238

## DISTRESS CASES—TRIAL IN.—Continued.

PAGE

certificate to the sheriff constitutes his authority to sell.....	238
must apply proceeds as directed in certificate.....	238
lien on growing crops is paramount and all persons must take notice.....	238
lien not lost by failure to enforce promptly.....	238
wheat sown in the fall and harvested the next year liable to lien for both years' rent.....	239
landlord's lien on growing crops entitled him to possession.....	239
he may recover by replevin.....	239
lien not confined to any particular crop.....	240
rent lien for property situated in two townships....	240
what tenant may show if property replevied.....	241
appraisement of property imperative.....	241
commencement of landlord's lien.....	241
lease of purchasers without notice.....	242
statute generally controls landlord's lien.....	242
lien on undivided crops.....	242
distress for rent is for rent due only.....	242
other matters may be brought in by defendant.....	242
what landlord can recover.....	243
trespass will lie against landlord for making an illegal levy.....	243
claiming more rent than due wrongfully makes landlord liable as trespasser.....	243
excessive levy, by mistake, not wrongful.....	244
defendant may show eviction on trial for distress for rent.....	244

## E

## EVICTION.

definition of eviction.....	245
actual eviction defined.....	245
forcible expulsion not necessary.....	246
taking portion of premises—eviction.....	246
interfering with enjoyment of premises.....	246
nature of the interference considered.....	246
constructive eviction defined.....	247

## EVICTION—Continued.

PAGE

acts constituting co structive eviction.....	247
acts that do not amount to eviction.....	248
must be such as justify tenant in leaving.....	248
riotous and obscene behavior of landlord—eviction..	248
eviction of part by railroad company.....	248
foreclosing a chattel mortgage on furniture not eviction.....	249
if tenant ousted by judgment—eviction.....	249
a judgment prosecuted to ouster—an eviction.....	249
tenant can not remain in premises and refuse to pay rent.....	249
if neither actual nor constructive expulsion tenant must pay rent.....	249
no constructive eviction without surrender of the premises.....	249
tenant can not plead eviction and remain in the premises.....	250
no eviction without actual abandonment of whole or part of premises.....	250
eviction is a question of fact for the jury.....	250
temporary interference with water pipes not an eviction.....	250
cases illustrating doctrine of eviction.....	250, 251

## EVICTION, EFFECT AND CONSEQUENCES OF.

may prevent the recovery of rent.....	251
when eviction exonerates tenant from rent.....	251
collecting rent from an under-tenant exonerates tenant	251
any act of landlord rendering lease unavailing exonerates from rent.....	251
if landlord wrongfully ousts tenant rent is discharged	252
taking part of the premises by landlord exonerates tenant.....	252
eviction no bar to rent previously accrued.....	252

## EVIDENCE.

occupants—declarations of, are admissible.....	173
equitable title in tenant can not be proven.....	173
evidence to disprove title of plaintiff not admissible..	173
demand must be proven.....	173

## EVIDENCE—Continued.

PAGE

defective demand not waived by trial..... 174

## EXTENT OF POSSESSION.

action not defeated by proof that plaintiff occupied  
only house and garden..... 113leasing of building without passage-way to and from  
the same considered..... 113

what the law presumes in such cases..... 113

possession of a farm draws to it the possession of  
wood-land belonging to it..... 113lessee of land bordering a stream entitled to accre-  
tions..... 114

even if bank is a boundary..... 114

heretofore the proof must correspond with complaint..... 114

now statute authorizes recovering a part only..... 114

## F

## FORCIBLE ENTRY.

the proof necessary..... 174, 175

that plaintiff had actual possession..... 174

that defendant invaded that possession..... 175

that the possession was withheld by the defendant.. 175

if original entry unlawful no demand necessary..... 175

## FORCIBLE ENTRY AND DETAINER.

statute of Illinois on the subject..... 52, 60

the purpose of the action..... 52

the six causes of action stated..... 52

demand—service—return..... 53

growing crops..... 54

complaint and summons..... 54

process from different courts..... 55

when summons not served in time..... 56

service of summons returned..... 56

trial in justice courts..... 56

trial in court of record..... 57

no formal pleading required..... 57

trial *ex parte* and default..... 57

when plaintiff entitled to hold premises..... 57

when entitled to part premises..... 57

## FORCIBLE ENTRY AND DETAINER—Continued.

PAGE

judgment, execution and costs.....	57
when several occupants of same premises.....	58
result when plaintiff non-suited.....	58
when defendant recovers costs.....	58
when judgment shall go for part of premises.....	58
when parties entitled to appeal.....	58
time allowed for appeal.....	58
no writ of restitution issued for five days after judgment.....	59
defendant's appeal bond.....	59
plaintiff's appeal bond.....	59
new bond ordered by the court.....	59
former law of forcible entry and detainer repealed..	59
forcible entry by common law.....	59
result prejudicial to the public peace.....	59
statutes enacted to remedy the evil.....	60
what is disseisin.....	60
landlord has no right to use violence.....	60
party in possession can not be forcibly expelled.....	60
must resort to the action provided by law.....	61
ejectment, the action to try title.....	61
forcible entry and detainer the means of obtaining possession.....	61, 62

## FIXTURES.

definition of fixtures.....	223
landlord's fixtures.....	223
tenant's fixtures.....	224
removing fixtures.....	225
fixtures that may be removed.....	225
gas fixtures by tenant may be removed.....	225
they must be removed when.....	225
gas fixtures when not removed.....	225
gas pipes may not be removed.....	225
flowers planted are fixtures in England.....	226
trade fixtures may be removed.....	226
criterion as to fixtures is the intention of party.....	226
a mirror built in the wall is part of the realty.....	226
bar and counter in a saloon trade fixtures.....	226

## FIXTURES—Continued.

PAGE

cigar stand fixtures in a hotel are trade fixtures.....	227
distillery pipes trade fixtures.....	227
fixtures left when tenant vacates become part of the realty.....	227
trover will not lie for fixtures annexed.....	227

## FORFEITURE OF LEASES.

forfeiture not favored by the courts.....	31
clear proof required to warrant forfeiture.....	31
tenant should have notice before declaration of for- feiture.....	32
all forfeitures odious to the law.....	32
law must be strictly complied with.....	32
the landlord must indicate his intention to terminate lease.....	32
tenant has entire day to pay rent.....	32
demand, notice and failure to pay indispensable....	32, 33
possession of tenant that of the landlord.....	33
claiming of adverse possession forfeits the term.....	33
effects of forfeiture as to sub-tenant.....	33

## FORFEITURE AT COMMON LAW.

demand on a certain day was required.....	33, 39
can be made now at any time after default.....	33
double rent for willful holding over.....	34
amount the tenant should pay for use and occupation	34
covenants made for the benefit of the lessor only...	34
assignment without consent voidable.....	34
assignment contrary to the terms of the lease voidable	34
case stated to illustrate forfeiture.....	34
forfeiture prevented by tenant paying within ten days	34
four things necessary to work forfeiture. ....	35
forfeiture will not be presumed.....	35
the tenancy must be ended according to law.....	35
what authorized landlord to expel tenant.....	35
rents collected after re-entry.....	35
landlord may re-let premises... ..	35
rents after re-letting.....	35
tenant liable after re-entry by landlord.....	36
conditions of a lease for years.....	36

	PAGE
FORFEITURE AT COMMON LAW—Continued.	
estate ceases on condition broken.....	36
landlord has the option to forfeit.....	36
FORFEITURE, WAIVER OF.	
receiving subsequent rent waives forfeiture.....	37
what acts of the landlord waives forfeiture.....	37
forfeiture of lease to three tenants.....	37
suing for subsequent rents waives forfeiture.....	37
acceptance of security for rent does not extinguish lease .....	37
taking note for rent does not waive right of distress	38
tender of rent waives the forfeiture.....	38
FORCE NECESSARY.	
nailing up a door is not forcible detainer.....	68
a tenant refusing possession after termination of his lease constitutes a constructive forcible detainer..	68
no actual force is necessary.....	69
originally actual force necessary.....	69
any entry against the will of another is forcible in legal contemplation.....	69
the owner may enter peaceably if he can.....	69
statute takes away the common law right of entry by the owner.....	69
legal rights, however strong, do not warrant a violent entry .....	69
where entry allowable the detention alone is tortious	69
if entry is forcible right of action complete without detention.....	70
constructive force only is necessary in detainer cases	70
the action accrues as soon as detention becomes illegal.....	70
taking possession by building a fence is sufficient...	70
right of action vests in the landlord as soon as the tenant's right of possession ceases... ..	71
every entry against the will of the occupant is forcible.....	71
<b>G</b>	
GAS FIXTURES.	
when may be removed.....	225



## GAS FIXTURES—Continued.

PAGE

when may not be removed.....	225
time of removal.....	225

## GAS PIPES.

gas pipes may not be removed.....	225
distillery pipes are trade fixtures.....	227

## GROWING CROPS.

in case of failure in contract of purchase the purchaser entitled to gather crops.....	86
he has a right to enter for that purpose.....	86
must pay rent before he removes crops.....	86
landlord has paramount lien.....	237
no lien except on crops.....	237
purchaser of farm takes it subject to lien.....	237
lien lost if no notice to purchaser.....	237
what persons affected by lien.....	237

## GROWTH OF THE ACTION UNDER THE STATUTE.

a bird's eye view of the action.....	98
two cases originally.....	99
what a wrongful and what a violent entry.....	99
three cases under a later statute.....	100
now six causes of action under laws of 1861.....	100, 101
a landlord getting the key by fraud may be ousted.....	101
a tenant at will can maintain the action.....	102
the right of immediate possession is the test.....	102
where party abandons premises he can not maintain the action.....	102
plaintiff must have right of exclusive possession....	102
if possession is joint neither one can gain exclusive possession.....	102
right of action rests alone in the party entitled to the possession.....	102, 103

## H

## HOLDING OVER AFTER TERMINATION OF LEASE.

proof necessary to be made.....	178
relation of landlord and tenant.....	178
right of possession in landlord.....	178

	PAGE
HOLDING OVER AFTER TERMINATION OF LEASE.—Continued.	
termination of tenancy.....	178
the demand.....	178
that the premises are withheld.....	178
no notice to terminate tenancy required where tenancy expires by its own terms.....	178
HOLDING UNDER CONTRACT OF PURCHASE.	
purchase—holding under contract of.....	178
the proof necessary to support this action.....	178
that plaintiff sold the premises.....	178
possession of defendant under the agreement.....	178
failure to comply with the agreement.....	178
demand in writing.....	178
withholding possession of premises after demand....	179
holding after judgment of ouster.....	179
proof necessary to sustain this action.....	179
that plaintiff is a purchaser at judicial sale.....	179
the foreclosure.....	179
expiration of time after redemption.....	179
the demand for possession.....	179
the withholding.....	179
how deeds can be used as evidence in such cases....	179, 180
for what purpose deed can be used.....	180
HUSBAND—WIFE.	
when lessee's wife not a proper party to suit for possession.....	190
when writ of execution properly served against wife.....	191
when wife should be joined with.....	191
when judgment against head of the family.....	191
wife divorced no right in premises.....	192
husband and wife jointly liable.....	50
I	
INCREASED RENT.	
notice of to tenant.....	47
tenant must pay or quit.....	47
if tenant won't pay, landlord must oust him.....	47
IMPLIED LEASES.	
implied from holding over.....	6
old lease renewed by accepting rent.....	6

	PAGE
IMPLIED LEASES—Continued.	
implied lease presumed from silence.....	6
IMPROVEMENT.	
making on land, an act evincive of possession.....	95, 110
INJUNCTION.	
injunction not to issue pending appeal.....	152
INN.	
distinction between boarding-house and.....	27
INTENTION.	
as collected from instrument must govern in con- struing contract.....	8
to assert possession, what acts sufficient presumption of.....	110, 112
of tenant alone can not rebut presumption arising from holding over.....	8
answers and intention shown by deeds.....	168
<b>J</b>	
JOINT TENANT.	
can not recover exclusive possession against co-ten- ant.....	107, 108
can not recover all the premises.....	107, 108
JOINT OCCUPANTS—JOINT TENANTS.	
if occupation joint no one can recover exclusive possession.....	107
joint tenant can sue but can only recover an undivided interest.....	107
a joint right inconsistent with an exclusive right...	108
joint tenant can not deprive his co-tenant of a com- mon right.....	108
JUDGMENT—WHO AFFECTED BY.	
is only conclusive as to the right of possession.....	157
one who did not purchase <i>pendente lite</i> can not be injuriously affected by the judgment.....	157
trespassers should pay interest on the rental value of premises withheld.....	158
defendant disclosing a good defense should have a new trial when judgment taken by confession...	158
when execution takes precedence of claim for rent..	158

	PAGE
JUDGMENT—WHO AFFECTED BY.—Continued.	
the form of the judgment in such cases.....	158
a motion to quash too late after the jury impaneled and sworn.....	159
suit may be brought for each month's rent when due.	159
JUDGMENT IN FORCIBLE ENTRY AND DETAINER.	
statutory provisions.....	183
judgment for the whole of the premises if evidence warrants.....	183
judgment for part only according to the proof.....	183
dismissal as to part—judgment as to part.....	184
if plaintiff fails defendant shall recover costs.....	184
description indefinite—judgment unauthorized.....	184
judgm nt on a description unwarranted.....	185
judgment conclusive as to possession.....	185
conclusive as to the same parties at the same date..	185
it must be the same parties—same premises as prior suit.....	185
the successful party should have judgment for costs	185
JUDGMENT ON DISMISSAL IN CIRCUIT COURTS.	
the circuit court on dismissal of appeal can award a writ of possession.....	186
such judgment valid in collateral proceedings.....	186
judgment in forcible detainer—effect of.....	186
conclusive only as to matters determined.....	186
not conclusive as to the title.....	186
conclusive as to possession.....	186
judgment can be pleaded in ejectment.....	186
judgment confined strictly to matter determined....	187
conclusive as to existence of tenancy.....	187
as to wrongful holding over.....	187
judgment does not bar tenant from claiming rent as a purchaser of title.....	187
JUDGMENT BY CONFESSION.	
heretofore sustained by the <i>nisi prius</i> courts.....	187
now held invalid.....	188
judgment of ouster by confession is <i>coram non-judice</i> and void.....	187
such judgments are invalid except for debt.....	187

**JUDGMENT BY CONFESSION.—Continued.**

PAGE

judgment for torts not valid.....	187
the court has only such power as the statute gives..	187
confession must be for a <i>bona fide</i> debt due.....	189
no power given to confess judgment for a tort.....	189
judgment—against whom entered.....	189
against parties in possession when suit brought.....	189
against lessee and sub-tenant.....	189
parties entering <i>pendente lite</i> may be ousted.....	190

**JUDGMENT AGAINST SUB-TENANTS.**

a sub-tenant by statute liable in this action.....	190
judgment cannot go against a sub-tenant in possession before the commencement of suit unless made a party.....	190
judgment against several when part in possession is erroneous.....	190
in Kansas an officer has no right to remove a party unless he holds under the defendant.....	190
a wife not a necessary party in a suit against her husband.....	190
judgment against husband sufficient to oust husband and wife.....	191
where wife owns the property action must be against her.....	191
wife can not set up ownership of a dwelling house from which her husband is ousted, to defeat the action.....	191
the head of the family ousted the whole family must go out.....	191
wife loses all rights of possession by decree of divorce against her.....	192

**JUDGMENT ENTERED FOR PART OF PREMISES.**

judgment and execution for such part as may be proven.....	115
--	-----

**JURISDICTION.**

justice courts had sole jurisdiction originally.....	135
now, courts of record have jurisdiction also.....	135
consent of parties will not confer jurisdiction.....	135
what the plaintiff must show to give jurisdiction.....	136

	PAGE
JURISDICTION.—Continued.	
as between vender and vendee the three elements must combine.....	136
writ of error does not lie from a superior court to review proceedings.....	136
if complaint is materially defective judgment can not be pronounced.....	137
instances of mis-description.....	137
the statute conferring jurisdiction must be strictly pursued.....	137
how given to the upper court.. ..	262
when appeal perfected before the clerk.....	262
going to trial without objection to defective affidavit	262
an appeal bond not providing for payment of rent useless.. ..	263
JURISDICTION OF JUSTICE COURTS.	
a justice has jurisdiction without regard to the amount of rent reserved in lease.....	139
right of possession is the only question.....	139
the \$200 limitation of justices of the peace does not apply in these cases.....	139
JURISDICTION IN CIRCUIT COURTS.	
circuit and superior courts have a special statutory power in these cases.....	139
if a justice assumes jurisdiction where the title of real property is in question he becomes a trespasser	140
on the appeal if the justice's transcript shows complaint was filed it is sufficient.....	140
the appellate court has no jurisdiction where a freehold is involved.....	140
in Georgia a justice in one county can issue process to another.....	141
jurisdiction in various states.....	141

## K

KEY—delivery of, indicates acceptance.....	126
--	-----

## L

## LANDLORD'S LIEN ON CROPS.

PAGE

landlord's lien on crops paramount to execution lien	237
landlord has no lien except on crops.....	237
"a valid and first lien" refers to the property.....	237
purchaser of farm crops takes them subject to lien.	237
lien lost if crops remain without notice to <i>bona fide</i> purchaser .....	237
what persons affected by lien reserved in lease.....	237

## LAND UNOCCUPIED—PROOF REQUIRED.

that the lands were unoccupied.....	176
defendant's entry without right.....	176
that the plaintiff unlawfully withholds.....	177
actual possession claiming the fee is presumed.....	177
unoccupied lands—title of presumed in owner .....	177

## LEASE, THE.

definition of lease.....	2
what the word includes.....	2
who is lessor—lessee .....	2
may be verbal or written.....	3

## LEASES, WRITTEN.

may be made by agent.....	3
lease unsealed on verbal authority.....	3
lease sealed requires power under seal.....	3
duplicates are originals.....	3
lease need not be sealed .....	4
if sealed must have "seal" or "scroll".....	4
date of lease not essential.....	4
signature to lease indispensable.....	4
signature may be in ink, pencil or stamp.....	4
infant—lease by—voidable.....	5
accepting rent ratifies lease.....	5
form of lease not important.....	5
dissenting letter with sealed lease of no effect.....	5

## LEASES—IMPLIED.

acceptance of rent by parties implies a lease.....	6
old lease renewed by accepting rent.....	6
lease implied from holding over.....	6
tenant holding over without lease bound.....	6

	PAGE
LEASES—IMPLIED.—Continued.	
landlord has the option if tenant holds over.....	7, 8
assignee of lease holding over is bound.....	7
covenants in lease "run with the land" .....	7
where property offered for rent, ratified by silence..	8
liability of tenant fixed independent of intention....	8
LEASES—PAROL.	
new parol lease surrenders the old one.....	8
verbal lease not exceeding one year valid.....	8
after lease made parol promises of landlord void....	9
parol lease for one year to commence <i>in futuro</i> void	9
void lease good if ratified by parties.....	9
parol license, after end of lease, revocable.....	9, 10
parol change, of sealed lease, invalid.....	9, 10, 12
good if for new consideration .....	9, 10
verbal lease by wife binds the husband.....	10
parol lease "by the year" is for one year.....	10
no notice needed to terminate an executed lease....	11
all implied covenants done away by express ones...	12
fraudulent lease may be rescinded.....	12
an offer to reduce rent, void unless agreed to.....	12
parol contract not included in lease void.....	12
what may be leased.....	13
what consideration in leases.....	13
may be something beside money rent.....	14
change of payment to shorter time good considera- ation.....	41
agreement for a lease defined....	14
what is a present demise.....	14
what is a covenant to renew.....	14
lease one year, with privilege, construed.....	14
if one party only bound it is not a lease.....	15
proposition to lease, not accepted may be withdrawn	15
when lease commences if date not fixed.....	15
a lease for unlimited time conveys the fee.....	16
LESSEE MAY SHOW ON TRIAL.	
may show his landlord's title expired.....	167
may show a conveyance by lessor.....	167
extent of possession shown by deeds.....	167



## LESSEE MAY SHOW ON TRIAL.—Continued.

PAGE

that title has been sold on execution.....	167
boundary shown by deeds.....	167
tenant not prohibited from purchasing premises.....	168
animus and intention shown by deeds.....	168
that title passed into other hands may be shown by tenant.....	168
source of title may be shown.....	168
plea of the tenant.....	168
fraud or mistake an exception to this rule.....	168

## LEASES—PROMISCUOUS POINTS REGARDING.

formerly a corporation could not lease without a seal	49
may now lease without one.....	49
guardian has no power except through the probate court.....	49
where land taken by condemnation proceedings.....	50
results to tenant.....	50
where the premises for street.....	50
rent of tenant abates.....	50
when lease merges in the fee.....	50
husband and wife jointly and severally bound for rent.....	50
rights of riparian proprietor.....	50
rights of owner over land acquired by accretion....	50
what appurtenances include.....	50
it does not include property disconnected.....	51
court will bind appraisers if appraisers refuse to act	51
the covenants of a lease by partnership are joint and several .....	51
suit may be brought against one or all of the persons	51

## LESSEE—POSSESSION UNDER.

person occupying with or for the tenant must go out with him.....	80
secret arrangement between tenant and sub-tenant..	80
a person occupying with tenant can not be considered a sub-tenant.....	80

## LODGERS.

who are.....	27
--------------	----

## LODGERS.—Continued.

PAGE.

distinction between lodger and tenant.....	27
no interest in the real estate.....	28
when lodger becomes a tenant.....	28
lodgings and extras—lien for.....	29
letting lodgings is not sub-letting.....	27
when lodger liable for injuries.....	27, 31
lodgers—inmates—tenants.....	31
see rooms and lodgings.....	25

## M

## MISTAKE, ARTIFICE AND FRAUD.

tenant misled by lessor can plead fraud.....	169
pleas available for tenant.....	170, 171
the settled rule as to the tenant's plea.....	172
officer ousting from wrong premises liable.....	98

## N

## NOTICE.

no notice to quit necessary if possession was obtained illegally.....	126, 127
no notice to quit required where tenant or sub-tenant holds over.....	127
no notice to quit required where no tenancy.....	127
no notice to quit required where the tenant repudi- ates landlord's title.....	127
where ten days' notice given the tenant can pay dur- ing ten days.....	127
the legislature intended to give tenant ten days' to pay.....	128
if tenancy not terminated the action will not lie...	128
a mere occupant for eighteen years entitled to notice to quit.....	129
if occupant holds by consent of owner he is entitled to notice to quit.....	129
purchaser at sheriff's sale must make demand for possession before suit.....	129
acts of parties may terminate a lease without notice	130
notice to terminate a yearly tenancy.....	131
when said notice should be given.....	131

## NOTICE.—Continued.

PAGE

the day mentioned must correspond with the commencement of the tenancy.....	131
must be the anniversary of the commencement of the lease.....	311
what is evidence of service.....	134
what is proof of termination of tenancy.....	134

## NOT GUILTY.

plea of not guilty good.....	151
------------------------------	-----

## NUISANCE.

renting premises in a dangerous condition a.....	211
landlord liable for nuisance when.....	211

## O

## OBJECTIONS.

must be taken in court below.....	160
otherwise if the court has no jurisdiction.....	160

## P

## PENALTY OF APPEAL BOND.

must secure costs, accrued rents and rent to accrue	264
where appeal perfected in justice courts.....	264
appellee bound to follow appeal.....	264
when appellee can dismiss appeal.....	264
effect of giving new appeal bond.....	264
the former bond thereby extinguished.....	264
amendment of appeal bond in discretion of the court	264
if justice fails to take sufficient appeal bond—liable	265

## PLEADINGS.

summons from justice.....	149
summons from court of record.....	149
returnable when.....	149
publication.....	149
jury trial before justice.....	150
trial in court of record.....	150
no written pleadings other than complaint necessary	151
plea of not guilty always good defense.....	151
what it puts in issue.....	151
allegations in the declaration if not denied stand...	151

	PAGE
PLEADINGS.—Continued.	
defects taken advantage of by plea in abatement...	151
judgment on plea in abatement final.....	152
what the tenant can plead as defense.....	152
injunction will not issue pending appeal .....	152
bringing action of forcible entry and detainer does not deprive plaintiff of other remedies.....	152
disclaimer by plaintiff may be pleaded.....	160
PLEADINGS—AMENDMENTS.	
defects in proceedings should be found at first.....	153
if defective amended instanter.....	153
the proper course as to amendments.....	153
PLEAS.	
no plea but not guilty required... ..	153
all matters and defense under this plea.....	153
requirements of the statute strictly complied with	154
PRACTICE.	
papers amended as fully as in other cases.....	154
appeal bond may be amended.....	154
courts fix the time within which to be amended...	154
all amendments in discretion of the court.....	155
every defective appeal bond may be amended.....	155
objecting parties should take a rule to remedy defects	155
if complaint defective a motion to quash is proper..	155
motion should be made before trial.....	155
at least at an early stage of the suit.....	155
the court disregard equity and enforces only legal rights.....	156
judgment for rent or damage improper.....	156
defendant's possession must be shown.....	156
one suit pending does not prevent the commencement of another.....	156
parol proof can not be heard to contradict the record in foreclosure.....	156
plaintiff can prove that he was possessed of part of the premises claimed.....	156
proof must conform to the complaint.....	157
refusal to permit amendment can not be assigned for error.....	157

## PRACTICE,—Continued.

PAGE

a variance between the judgment and verdict fatal. 157

## POSSESSION.

what possession necessary for plaintiff..... 109

plaintiff must prove peaceable possession..... 109

must show actual possession..... 109

such as the fee simple title draws to it is not sufficient..... 109

does not require *pedis possessio* to support the action 110

actual possession of a farm will include an unenclosed wood lot..... 110

possession must be in plaintiff at the time he brings suit..... 110

fences, buildings and cultivation indicate possession 95, 110

keeping goods on the premises sufficient..... 110

the possession in all cases must be *bona fide* to support the action..... 110

temporary absence does not destroy possession..... 110

plowing one-half day on land is not sufficient possession..... 110

sufficient possession shown by acts..... 95

delivering a key to a person other than the landlord does not give possession..... 111

where an officer of a corporation takes possession it is that of the company..... 111

if actual possession relied on it must be fully proven 111

it must be open, exclusive and public..... 111

such possession as men generally employ..... 111

twenty years' possession claiming title is sufficient possession..... 111

placing goods by landlord into vacant premises is taking possession..... 112

## POSSESSION—CONSTRUCTIVE.

a tenant in taking the landlord's goods up-stairs is a surrender of possession..... 112

preparing to occupy house and leaving with the intention of returning is possession..... 112

conflicting claims for possession considered..... 112

what acts show abandonment of possession..... 113

	PAGE
POSSESSION—CONSTRUCTIVE.—Continued.	
preparing to cultivate shows possession.....	113
a constructive and scrambling possession is not sufficient.....	113
POSSESSION—COLLUSIVE.	
collusive possession will not sustain the action.....	159
notice—defects in, not waived by appearance.....	160
disclaimer by plaintiff may be pleaded by defendant	160
judgment should not be rendered against several defendants when one in possession.....	160
on a ten year lease tenant should pay taxes.....	160
in appeal cases objections not taken in court below disregarded, otherwise if the court has no jurisdiction.....	160
POSSESSION MUST BE RESTORED.	
tenant's possession must be restored to landlord before he can assail title.....	166
deeds may be introduced to show the extent of possession.....	166
title immaterial in these cases.....	166
accepting lease admits the landlord's title.....	166
PROCEEDINGS FOR DISTRESS.	
description of premises in distress warrant is surplusage.....	231
landlord limited to claim made.....	231
warrant is summons and declaration.....	236
proof offered by the defendant.....	236
what the court must determine.....	231
in distress cases lease need not be filed.....	232
no declaration is necessary.....	232
if defendant pleads no rent in arrears only he can not recover damages.....	232
set off or notice under the general issue necessary to recover damages.....	232
where there is no rent due replevin will lie.....	232
landlord can not distrain goods of tenant's assignee.	232
rent must be certain and specific to authorize distress	232
landlord can not apportion rent.....	232
evidence as to crops.....	233

## PROPERTY SUBJECT TO LEVY.

PAGE

only personal property subject to distress .....	234
landlord's lien is by virtue of the common law .....	234
statutes regulate but do not interfere with the right .....	234, 235
time within which distress will lie .....	235
landlord may distrain without that right being re- served in lease .....	235
who may distrain for rent .....	235
if tenant abandon premises landlord may distrain for rent not due .....	235

## R

## RE-ENTRY BY LANDLORD.

re-entry by landlord may determine lease .....	221
when re-entry does not stop rents .....	221
the mode of re-entry considered .....	222
accruing rent and damages considered .....	222

## RENT—INCREASED RENT.

tenant presumed to accede to new terms by remain- ing .....	200
tenant not bound unless he accede to new terms .....	201
if tenant remains and refuses to pay rent landlord must put him out .....	201
silence of tenant implies consent to new terms .....	201
no such presumption where he refuses to pay .....	201
tenant having right to abandon will waive his right by remaining .....	201
where a landlord fails to repair as agreed the tenant may abandon premises .....	202
lessor can not collect rent where he fails to repair as agreed and tenant goes out .....	202

## REPAIRS.

repairs to be made by landlord, no time stated, may be made in a reasonable time .....	203
tenant should notify him to repair .....	204
if landlord agrees to repair at a certain time no notice required .....	204
repairs before the commencement of the term is a condition precedent to the payment of rent .....	204

	PAGE
REPAIRS—Continued.	
tenantable repairs defined.....	204
REPAIRS—LANDLORD'S DUTY AS TO.	
landlord does not insure the premises to be in healthy condition.....	205
not bound to repair unless required to do so by the lease.....	205
not liable for damage when defects arise during tenancy.....	205
landlord liable to tenant for failure to repair as agreed.....	205
landlord renting a store in a building must keep the building in safe repair.....	206
landlord not bound for repairs made by order of lessee.....	206
landlord failing to keep roof in repair as agreed liable for damages.....	206
rent does not stop while receiving repairs.....	206
as a general rule a tenant is liable for injuries in consequence of repairs not being made.....	207
tenant must take premises as he finds them unless otherwise agreed.....	207
if landlord fails to make agreed repairs tenant may make them and charge the landlord.....	207
RENT—DISCHARGE FROM.	
tenant can not defend against unless evicted.....	253
decree of sale against landlord, not an eviction.....	253
landlord can not apportion rent by his own wrong.....	253
accrued rent collected on note of ousted tenant.....	253
eviction under paramount title discharges rent.....	253
eviction of part premises by a stranger apportions rent.....	253
eviction, or no eviction, depends on facts before the jury.....	253
tenant can not complain until evicted whether landlord has title or not.....	254
eviction cases considered.....	254
failure to repair does not amount to eviction.....	254
threats by landlord may amount to eviction.....	255



## RESTITUTION.

PAGE

definition of the term .....	193
no writ to issue until time for appeal expires.....	193
under a decree the plaintiff will be entitled to a writ of possession or he can sue in forcible detainer.	194
these two are concurrent remedies.....	194
power of officer in executing writ of possession....	195
can remove defendant and his property.....	195
if he causes unnecessary damage he is liable.....	194

## ROOMS AND LODGINGS.

concerning tenements only.....	25
agreement to supply furniture.....	25
part of the rent contract.....	25
agreement for lodgings for more than one year should be in writing.....	25, 27
tenancy does not exist between landlord and guest or boarding-house keeper and guest.....	26
a lodger acquires no interest in real estate.....	26
what are the privileges of lodgers.....	26
the liabilities of lodgers.....	26
can not quit lodgings without proper notice.....	26
each apartment considered a distinct house.....	26
rule where owner lives in house.....	26
rule as to outer door.....	26
a bailiff may break open an inner door.....	27
lodger not liable for use and occupation unless he enters the lodgings.....	27
letting lodgings is not under-letting.....	27
distinction between a boarding-house and an inn....	27
the liabilities of a keeper of lodging house.....	27
who are lodgers .....	27
distinction between lodger and tenant.....	27
definition of the terms of lodger and tenant.....	28
the rule as to control over the house.....	28
lodger no interest in real estate.....	28
if a lodger leases apartments he becomes a tenant..	28
tenants' exclusive control of their rooms.....	28
the rule as to control of premises by landlord.....	29
lien on baggage for board, lodgings and extras.....	29

	PAGE
ROOMS AND LODGINGS.—Continued.	
effect of the landlord retaining the key without objection.....	29
the care required of a boarding-house keeper.....	30
liable for negligence of himself and servants... ..	30
liability of a lodging-house keeper not the same...	30
the implied condition in letting a furnished house..	30
an exception to the general rule.....	30
a general hiring of lodgings not by the year.....	30
weekly, monthly and quarterly rents.....	30
when lodgers responsible for injuries.....	31
what necessary to create the relation of landlord and tenant .....	31
who are inmates and who tenants.....	31
the word "landlord" defined.....	31

## S

## SERVICE OF THE DEMAND.

when it must be served.....	117
must be made before suit commenced.....	117
admitting demand in evidence does not presume service.....	117
demand by agent should disclose agency.....	118
must be served by plaintiff or some one authorized by him.....	118
written demand should be delivered to defendant himself.....	118
what proof necessary of demand.....	118
when demand and refusal to surrender must be proven.....	118
what demand a mortgagee must make.....	118
mortgagees must make demand before commencing suit.....	118
form of demand.....	275, 276

## SET-OFF AND RECOUPMENT.

liquidated demands may be set-off.....	215
a surety for rent can plead any matter of discharge	215
a judgment for rent satisfied of record bars any future action of rent which had accrued before that time.....	215

## SET-OFF AND RECOUPMENT—Continued.

if tenant proves in access of the amount agreed on	
he can not set it off against the rent.....	215
tenant can set-off his damages against rent.....	215
he can recoup where the demands grow out of the	
same transaction.....	216
if landlord fails to repair the tenant may recoup from	
the rent.....	216
the tenant can recoup damages sustained by leaky	
roof where suit for breach of lease.....	217

## SEWER GAS—DEFECTIVE PLUMBING.

landlord not bound for defects in plumbing.....	210
tenant can rescind lease on account of fraudulent	
representations.....	210
if he remains in possession he must pay the rent...	211
if premises rented with sewer gas in them tenant	
must go out or pay rent.....	211
the law does not require the landlord to make premi-	
ses tenantable.....	211
in the absence of an agreement to that effect land-	
lord not bound to keep the buildings in repair..	211
if landlord fail to repair as agreed tenant may recoup	
his damages.....	211
if landlord agrees to make repairs the tenant after	
notice may make them and charge the expense	
to the landlord.....	211
landlord not liable for damages from sewer gas unless	
he rented the premises in dangerous condition..	211

## SUB-TENANTS.

a sub-tenant entering <i>pendente lite</i> dispossessed....	77
statute contemplates an action against sub-tenant...	77
a sub-tenant not entering <i>pendente lite</i> must be made	
a party.....	77
if lease forfeited an action lies against a sub-tenant	
even if landlord consented to sub-letting .....	78
whenever suit will lie against tenant it will lie	
against sub-tenant.....	78
if lease forfeited the right of the sub-tenant is gone..	78

## SUB-TENANTS.—Continued.

PAGE

if first tenant holds over second tenant must sue for possession.....	78
demand for possession must be made after termination of the tenancy.....	79
remedy where tenant holds over after expiration of his term.....	79
where the landlord excludes the tenant during his absence the tenant will be restored by this action	79
one suit can not be maintained against several persons who hold in severalty.....	79
in some cases all may be joined but the judgments must be several.....	79
suit to recover rent must be in the same capacity as that in which the lease was signed.....	79
separate suits will not lie for several sums past due	80

## SUB-TENANTS AND THEIR RIGHTS.

provisions against sub-letting sustained by the courts	47
provisions for the benefits of the lessor alone.....	47
he can waive the breach.....	47
accepting rent from sub-tenant does not release the tenant .....	47
tenant can not sub-let longer than his term.....	47
notice of increased rent to sub-tenant.....	47
where assignment restrained by the agreement in the lease.....	47
co-partnership with the tenant is not a subletting...	48

## SURETIES ON APPEAL BONDS.

surety on appeal bond may be sued without first suing tenant.....	268
the undertaking of surety may be collateral.....	269
a person signing a lease may be shown to be surety instead of joint lessee.....	269
not allowed unless landlord has notice.....	269
bonds must be in writing.....	269
statutory provisions.....	269
bond must be made by appellant.....	269
sureties on old bond discharged by taking a new one	270
changes in bond by lessor will discharge surety.....	270

	PAGE
SURETIES ON APPEAL BONDS.—Continued.	
what changes by lessor discharge surety.....	270
a surety not entitled to notice of default of his principal.....	271
any defense of the lessee will avail his surety.....	271
SURETIES—THEIR DEFENSE.	
a surety failing to make his defense at law can not be heard in chancery.....	272
if a creditor deprives the surety of his defense the surety can plead it.....	272
whatever will discharge on a contract in law or equity can be pleaded by the surety as a defense	272
the old rule that no specialty can be avoided but by an instrument of equal solemnity has been modified.....	272
defenses in actions upon contracts and plea of payment allowed.....	272, 273
modifications by parol—no defense to a sealed instru- ment, nor can a written modification not sealed be pleaded.....	273
grounds of defense not pressed upon the hearing are waived.....	273
see co-sureties.....	271
SURRENDER OF LEASES.	
tenant can not surrender lease before the expiration of the term and relieve himself from rent.....	24
abandonment of premises will not discharge from rent	24
an act of the landlord rendering the lease unavailing discharges from rent.....	24
one party can not surrender a lease without concur- rence of the other.....	24
stipulation that a tenant may continue to occupy does not bind him.....	24
case stated on a privilege for five years.....	25
SUSPENSION OF RENT—DAMAGES.	
rent is compensation for use of land.....	256
when use of land taken away he need not pay.....	256
the landlord's intention must be clear in eviction cases.....	257

	PAGE
SUSPENSION OF RENT—DAMAGES.—Continued.	
eviction discharges all accruing rent.....	257
damages for eviction can be recovered by tenant...	257
the rule of damages in such cases.....	257
damages in case of eviction by paramount title.....	257
crops—value of if tenant evicted.....	258

## T

## TAXES.

ten years tenant must pay taxes.....	160
tenant for life must pay.....	160

## TENANCY, KINDS OF—TENANCY AT WILL.

who is a tenant at will.....	16
parties moving in, without agreement.....	16
party moving on lands without terms.....	16
getting possession under agreement for a lease.....	16
tenancy at will not assignable.....	16
at common law required no notice to terminate....	16
statutory notice required to terminate.....	17
an assignment terminates the tenancy at will.....	17

## TENANCY AT SUFFERANCE.

one who holds over without lease.....	17
has no estate that he can transfer.....	17
permission to occupy without agreement.....	17
a mortgagor after foreclosure.....	17
tenants <i>per autre vie</i> after the death of <i>cestui que vie</i>	17
tenants for years whose terms have expired.....	17
tenants at will whose term has ended.....	17
under-tenants holding over.....	17
at common law not liable for rent.....	18
tenancy at sufferance terminated at the pleasure of landlord.....	18

## TENANCY BY THE MONTH.

party entering under void lease and paying by the month is a tenant from month to month.....	18
he is entitled to a monthly notice to quit.....	18
a letting without time payable monthly is a tenancy from month to month.....	18
time of paying indicates the term.....	18

## TENANCY BY THE YEAR.

PAGE

reserving annual rent makes a yearly lease.....	19
annual rent with no time of payment is due at the end of the year.....	19
a general letting without time is from year to year.....	19
formerly six months notice required to end a yearly tenancy.....	19
sixty days notice under the statute sufficient.....	19, 20
a tenant holding over after the termination of a writ- ten lease will be compelled to pay the same rent as required by the lease.....	19
tenant can not abandon lease and avoid paying rent.....	19
remaining two years and raising crops a yearly tenancy.....	20

## TENANCY FOR LIFE.

tenancy for life created by instrument under seal only.....	20
no particular form of words required to create.....	20

## TENANT'S REMEDY.

tenant may abandon premises for landlord's fraud..	197
may sue landlord for breach of his covenant.....	197
may make repairs and deduct from rent.....	197
may abandon premises on account of landlord's fail- ure to repair.....	197
rent in advance can not be collected without agree- ment to that effect.....	197
sub-tenant not liable for rent of original lessee.....	198
tenant has no relief against covenant to pay rent unless by the terms of the lease.....	198
defense available to the tenant.....	198
defendant appearing without objection to the sum- mons waives its defects.....	198
tenant's defenses enumerated.....	199, 200
defendant may set up that plaintiff disclaimed possession.....	199

## TERMINATION OF SUB-LEASE.

sub-tenant may hold premises after lease terminates..	48
in case the landlord alienates the reversion.....	48
who can sue in case of alienation.....	49

## TERMINATION OF SUB-LEASE.—Continued.

PAGE

landlord can not sue after he parts with the right of possession .....	49
lessee alone must bring the action .....	49
where tenant must sue former tenant for possession .....	49

## TERMINATION OF TENANCY.

how long tenant can remain in possession .....	119
actual lease is forfeited or time expires .....	119
attorning to a stranger forfeits lease .....	119
denying landlord's title forfeits lease .....	119
no notice necessary where lease has expired .....	119
if landlord terminates lease for breach of same he must give notice .....	120
a notice is necessary where tenancy is indefinite ....	120
time of notice governed by the nature of the tenancy	120
ten days notice to quit where lease violated .....	120
a yearly lease terminated by sixty-day notice in writing .....	120
tenancy less than a year, as by the month, by a thirty-day notice .....	121
a void yearly lease is a monthly renting .....	121

## TITLE—TENANT CAN NOT DISPUTE LANDLORD'S.

tenant cannot dispute his landlord's title .....	163
tenant estopped from denying his landlord's title ....	164
title of premises not in issue .....	164
tenant not permitted to betray his landlord's possession .....	165
jury can not consider title .....	165
deeds may be introduced, but not to show title ....	165
tenant by entering premises acknowledges the landlord as owner .....	165
an under-tenant bound by the same rule .....	165
neither tenant nor his assignee can dispute landlord's title .....	166

## TRADE FIXTURES.

what are trade fixtures .....	225, 226
bar and counter in a saloon .....	226
cigar stand in a hotel .....	227
distillery pipes are .....	227



TRADE FIXTURES.—Continued.	PAGE
intention of tenant the criterion.....	226

## TWO REMEDIES AT THE SAME TIME.

law and chancery proceedings pursued at the same time .....	162
satisfaction of either judgment bars the other.....	162
action in forcible entry and detainer does not bar chancery proceedings.....	163

## U

## USE AND OCCUPATION.

the action not sustained unless the relation between landlord and tenant exists.....	212, 213
a contract may be express or implied.....	212
occupying after notice to pay rent tenant liable for use and occupation.....	212
it may lie against the occupant after contract of pur- chase is rescinded.....	212
occupancy under a contract for rent for a year com- mencing <i>in futuro</i> .....	213
if contract is void yet the action will lie.....	213
the rental value will be fixed at the time the liabil- ity arises.....	213
holding over under a parol lease makes the tenant liable for use and occupation.....	213

## V

## VARIANCE.

between judgment and verdict fatal.....	184, 157
between complaint and judgment fatal.....	184, 185
between description in lease and correct description, the complaint should disregard the description in the lease.....	145

## VENUE.

anywhere in the county wherein the premises are located.....	137
may issue to a different county where defendant re- sides.....	137
generally the venue is where the land is located....	137
the complaint is jurisdictional.....	138

	PAGE
VENUE.—Continued.	
if the justice has no jurisdiction the higher court has none.....	138
the complaint must be in writing.....	138
it can not be filed on the day of trial.....	138
complaint must be made before summons issued....	139
these matters can not be changed by the parties....	139
VERDICT.	
the jury must sign.....	194
in Illinois and Indiana all the jury must sign the verdict.....	196
unknown fraudulent sub-tenant ousted under writ..	195
they are presumed to occupy under the defendant..	196
circuit court on appeal may remand to justice of the peace .....	196
VIOLENCE.	
violence forbidden and remedy .....	60-61
W	
WAIVER.	
waiver of forfeiture.....	37
what tenant may prove on trial.....	167
who may maintain the action.....	92-98
WARRANT, THE—ITS OFFICE.	
warrant is a summons and declaration.....	236
what the declaration should contain.....	236
what the defendant may plead.....	236
proof that may be offered by the defendant.....	236
unauthorized acts of bailiff do not render the land- lord liable in distress cases.....	236, 237
WITHHOLDING WRONGFULLY.	
facts proven to sustain a wrongful withholding.....	176
possession of defendant.....	176
peaceable possession obtained by the plaintiff.....	176
the demand made.....	176
the withholding after demand.....	176
WRONGS—TWO IN ONE NAME.	
forcible entry and forcible detainer distinguishable..	64
statute generally regulated the degree of force neces- sary to support the action.....	64

	PAGE
WRONGS—TWO IN ONE NAME.—Continued.	
forcible detainer defined .....	64
forcible detainer may follow peaceable or forcible entry .....	64
statutes are in derogation of the common law and must be strictly pursued .....	64
action abates upon the death of defendant .....	65
two wrongs treated together .....	65
the entry was an offense at common law .....	65
the detainer punishable by law ..	65
in Arkansas the forcible entry and detainer is a tort	65
the remedy to protect actual possession only .....	65
WRIT OF POSSESSION.	
for other premises no justification of eviction .....	98
must be executed against party to suit .....	190
or against one entering <i>pendente lite</i> .....	190
when properly served against husband .....	191
WRIT OF RESTITUTION.	
when properly served against husband alone .....	191, 192
can not be issued until when .....	193
can be served as other writs .....	195
against whom must be executed .....	189, 195
circuit court may order upon dismissal of appeal...	186
form of .....	284



## INDEX TO FORMS.

	PAGE
Demand for possession.....	275
Notice to quit by an agent.....	275
Demand by an attorney.....	275
Notice to quit by the owner.....	275
Notice to terminate weekly tenancy.....	276
Ten days notice to quit for default.....	276
Another form of notice to quit.....	277
Notice to quit for landlord by the agent.....	277
Landlord's five days' notice.....	278
Sixty day notice to terminate tenancy.....	279
Another form of the same.....	279
Sixty day notice to be served by an agent.....	279
Thirty day notice to terminate a tenancy from month to month.....	280
A demand for possession disclosing the agent.....	280
Written authority to agent or attorney.....	280
Written authority to attorney to sue, etc.....	281
Complaint in forcible entry and detainer in Illinois.....	281
Summons in forcible entry and detainer.....	282
Appeal bond in forcible entry and detainer.....	283
Writ of restitution.....	284
Agreement for a lease.....	285
Agreement not to obstruct lights.....	285
To renew a lease.....	285
Agreement of surety in lease.....	285
Agreement to let furnished apartments.....	286
Form of guaranty of rent, etc.....	287
Assignment and acceptance of lease.....	287
Assignment of lease.....	288
Consent to assignment.....	288
Assignment by lessor.....	288
New lease with full powers.....	289
Skeleton lease.....	297
Short country lease.....	295











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